Supreme Court, U.S.
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No. 1

In The
Supreme Court of the United States

PAUL J. MEYERS, M.D.,
Petitioner,

v.

JOHN R. PARTRIDGE, M.D.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Health Care Quality Improvement Act, 42 U.S. § 11111(a), provide two independent bases of immunity to persons who provide information to a professional review body about the competence of a physician and, therefore, immunize persons who knowingly provide false information if the body is immune because the physician fails to rebut the presumption that the professional review action(s) against him met the standards of 42 U.S.C. § 11112(a)?

2. Does the Health Care Quality Improvement Act, 42 U.S.. § 11113, authorize award of attorney's fees where plaintiff challenges a defendant's immunity under 42 U.S.C. § 11111(a) on a case of first impression and defendant prevails solely on the basis of immunity?

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OPINIONS BELOW

The decision of the Virginia Supreme Court, dated October 26, 2007, finding no reversible error in the trial court's decision, is reproduced at App. A, 1a.

The final order entered by the Circuit Court for the City of Newport News on March 13, 2007, granting defendant's motion for attorney's fees in part is reproduced at App. B, 3a-6a. The court's letter opinion, dated January 11, 2007, is reproduced at App. C, 7a-16a.

The trial court's order entered on September 15, 2006 granting defendant's motion for summary judgment on plaintiff's First Amended Motion for Judgment is reproduced at App. D, 17a-19a, and the court's letter opinion, dated August 2, 2006, is reproduced at App. E, 20-39a.

The trial court's order denying defendant's demurrer to plaintiff's Motion for Judgment alleging four counts of defamation, entered on February 15, 2002, is reproduced at App. F, 40a-41a, and the court's letter opinion, dated February 5, 2002, is reproduced at App. G, 42a-46a.

JURISDICTION

The trial court entered a final order in this case on March 13, 2007. The Virginia Supreme Court refused plaintiff-appellant's Petition for Appeal on October 26, 2007. This petition is timely filed under Supreme Court Rule 13.1, and this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) to review the decision

of a lower state court that is subject to discretionary review.

Under Virginia law, litigants do not have a right of appeal to an intermediary appellate court from civil cases sounding in tort or contract, *see* Va. Code §§17.1-405 and 406 (defining the appellate jurisdiction of the Virginia Court of Appeals), and must petition the Virginia Supreme Court for appeal, *see* Va. Sup. Ct. R 5:7. Refusal of a Petition for Appeal is a judgment on the merits, *see Saunders v. Reynolds*, 204 S.E. 2d 421, 424 (Va. 1974), although if, as in this case, the court does not write an opinion, the decision has no precedential value, *see Sheets v. Castle*, 559 S.E. 2d 616, 619 (Va. 2002).

STATUTORY PROVISIONS INVOLVED

The relevant statute is the Health Care Quality Improvement Act, 42 U.S.C. §§ 11111(a)(1), (2) and 11113 (2006). These are reproduced at App. H, 48a-49a and 51a, respectively.

STATEMENT OF THE CASE

The question at issue is this petition is whether the Health Care Quality Improvement Act ("HCQIA" or "Act"), 42 U.S.C. §§ 11101-11152 (2006), immunizes even persons who knowingly provide false information to a professional review body about the competence of a physician if the body is held to be immune. By holding that it does, the Virginia Supreme Court has adopted a construction of the statute that further erodes the safeguards Congress enacted to ensure that

the immunity provisions of 42 U.S.C. § 11111(a) would not be misused.

I. BACKGROUND ISSUES

The expressly stated goal of HCQIA is to improve the quality of health care through effective peer review. 42 U.S.C. § 11101(1)-(3), App. H, 47a. Congress believed that federal immunity was required to achieve this goal because the threat of federal antitrust liability and treble damages discouraged physicians from engaging in effective peer review and disciplining their colleagues. *Id.*, § 11101(4), (5), App. H, 47a-48a; *Gordon v. Lewiston Hosp.*, 423 F.3d 184, 202 (3d Cir. 2005) ("At its heart, the HCQIA was intended to deter antitrust suits by disciplined physicians"). However, to ensure that the immunity would not be misused for discriminatory, anticompetitive and other antisocial reasons, the scope and level of immunity in the original bill were cut back "to balance the chilling effect of litigation on peer review with concerns for protecting physicians improperly subjected to disciplinary action". *See Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1322 n. 3(11th Cir. 1994), *cert. denied* 514 U.S. 1019 (1995); Charity Scott, *Medical Peer Review, Antitrust, and The Effect of Statutory Reform*, 50 Md. L. Rev. 316, 330-332 (1991) (describing the modifications made to the original bill to limit the scope of immunity).

For immunity to attach under 42 U.S.C. § 11111(a)(1), professional review actions[1] must meet the due process requirements and reasonableness standards of 42 U.S.C. § 11112(a). *See* App. H, 48a-50a; *Brown v. Presbyterian Health Care Services*, 101 F.3d 1324, 1333 (10th Cir. 1996) These standards are objective. *See Singh v. Blue Cross/Blue Shield of Massachusetts, Inc.*, 308 F.3d 25, 32 (1st Cir. 2002) ("Our sister circuits have uniformly applied all the sections of § 11112(a) as objective standards). There is a presumption that professional review actions meet these requirements and standards, but the physician may rebut the presumption by a preponderance of the evidence. 42 U.S.C. § 11112(a), App. H, a. If the physician fails to rebut the presumption of immunity, immunity attaches not only to the hospital but also to members of its medical staff, to persons under a contract or other formal agreement with the hospital, and to anyone who "participates with or assists [the hospital] with respect to [its] action" against the physician. *See* 42 U.S.C. § 11111(a)(1)(A)-(D), App. H, 48a.

Independently of the hospital's professional review actions and whether or not they meet the standards of 42 U.S.C. § 11112(a), the Act gives "Protection for those providing information to professional review bodies". *See* 42 U.S.C. § 11111(a)(2), App. H, 49a.[2]

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[1] *See* App. H, 51a-52a, 42 U.S.C. § 11151(9) (defining professional review action).

[2] *See* 42 U.S.C. § 11151(11), App. H, 53a, for definition of 'professional review body'.

Anyone who provides information to such a body in any manner is immune unless the person knowingly provides false information.

At issue in this case is the interplay between these two subsections of the HCQIA, § 11111(a)(1) and § 11111(a)(2). The specific question presented is whether these two subsections provide two independent bases of immunity to a person who provides information to a professional review body, and, therefore, whether a person who knowingly provides false information will be immune if the body is immune.

II. BACKGROUND FACTS

Riverside Regional Medical Center ("Riverside"), plaintiff's employer, summarily suspended plaintiff's privileges in obstetric and gynecology ("Ob-Gyn") on March 1, 2000. On April 17, 2000, Mary Immaculate Hospital ("MIH"), where plaintiff held privileges in gynecology, also summarily suspended plaintiff's privileges. Mary Immaculate's suspension was based on Riverside's action and the fact that Riverside refused to disclose to MIH the basis for its own action. On June 14, 2000, MIH's Medical Executive Committee voted to continue plaintiff's suspension until MIH obtained further information from Riverside, notwithstanding that plaintiff had never had any complications or adverse patient outcomes at MIH. On July 11, 2000, Riverside provided MIH with copies of the medical records of 31 patients plaintiff had treated at Riverside. On September 1, 2000, Mary Immaculate sent these records for review by defendant, an obstetrician gynecologist who earns

significant income as an expert witness. App. I, 54a. The records had not been reviewed by any committee or member of the Ob-Gyn department at MIH.

Defendant sent a preliminary report to MIH on September 25, 2000. After discussing the report with administrators and the hospital's attorney, defendant made substantial changes to his report and covering letter. Defendant deleted all favorable statements about plaintiff's handling and outcome of these cases from the original draft, substantially altered the specific statements about some of the cases, and made a number of new factually false assertions in the final report.[3] Defendant's final report dated October 9, 2000

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[3] For example, defendant stated that there were "7 cases with excessive operating time", and misstated the operating times in every case. He alleged that 5 cases had excessive blood loss, changed his original comments about each case, and deleted favorable comments about blood loss from other cases (e.g." Blood loss good at 200 cc."; "Blood loss well below average"). About one of these five cases, defendant originally wrote,

> "There may have been over-average bleeding; there is a discrepancy between estimates of blood loss listed in one place as 30 cc and in another as 500 cc... These rather minor issues certainly fall within the expected range of variation."

but changed this to:

> "There is a discrepancy between estimates of blood loss listed in one place as 30 cc and in another as 500 cc. The former seems excessive, the latter extreme."

(The "discrepancy' was based on an obvious typographic or transcription error in the dictated/typed operating report).

was the only one provided to peer reviewers who were unaware of the earlier draft and the changes made to it.

Plaintiff, unaware at the time that defendant had made these changed to his report, informed defendant that specific statements in his report were factually false, and provided defendant with supporting documents from the patients' medical records as well as citations to the medical literature. Plaintiff also provided defendant with statistics on his laparoscopic complications at Riverside and letters of support to administration by other faculty members and residents attesting to plaintiff's high quality of surgical skill, the principled nature of his patient care, and to the fact that other attending physicians frequently consulted plaintiff on difficult cases and asked him to teach them laparoscopic procedures. Defendant did not correct the factually false statements contained in his report. On September 5, 2001, plaintiff filed a *Motion for Judgment* alleging four counts of defamation per se against defendant. Plaintiff amended his *Motion for Judgment* by leave of court after defendant moved for summary judgment.

Plaintiff filed a separate suit against MIH alleging contract and tort theories of recovery arising from the summary suspension of his privileges and MIH's failure to reinstate them after a hearing panel determined, by clear and convincing evidence, that the information on which MIH based and continued his suspension was insufficient to "create a reasonable possibility of immediate injury to any patient employee or person present in the hospital" and recommended unconditional reinstatement of plaintiff's privileges.

The trial court granted MIH summary judgment holding that it was immune under 42 U.S.C. § 11111(a)(1) because plaintiff failed to rebut the presumption of immunity under 42 U.S.C. § 11112(a). On June 16, 2004, the Virginia Supreme Court refused plaintiff's petition for appeal finding no reversible error in the judgment.

Two years later, on the eve of trial, defendant in this case moved for summary judgment claiming he was immune because MIH was found to be immune. Relying on the holding and reasoning of *Jenkins v. Methodist Hospital of Dallas*, No. 3:02-CV-1823-M, 2004 U.S. Dist. LEXIS 28094, *48 (N.D. Tex. August 18, 2004), defendant contended that 42 U.S.C. § 11111(a) provides two independent bases of immunity to persons who provide information to a professional review body and rendered him immune because MIH was held to be immune. App. J, 58a. On this theory, a person who knowingly provides false information about the competence of a physician to a hospital forfeits immunity only under 42 U.S.C. § 11111(a)(2), but retains immunity under 42 U.S.C. § 11111(a)(1)(D) as a person who assisted the hospital with its action(s) against the physician if the hospital was immune. *Jenkins* at *48.

III. DECISIONS OF THE TRIAL COURT

Defendant filed a five-count demurrer to the *Motion for Judgment* contending that:

1. "he was immune from civil liability pursuant to section 8.01-581.19, Code of Virginia, 1950";

2. "he was not liable in damages pursuant to the Health Care Quality Improvement Act, 42 U.S.C. § 11101, et seq.";

3. "Plaintiff fail[ed] to allege any factual or legal basis to support Plaintiff's assertion of bad faith or malice";

4. "Plaintiff's Motion for Judgment fail[ed] to state a cause of action for defamation in that it allege[d] solely the expression of opinion based on an independent review of medical records";

5. "[he was immune] from civil liability as a result of Section 8.01-581.16, Code of Virginia, 1950, as amended".

See App. G, 43a-450a. On February 5, 2002, the trial court overruled each count of the demurrer, and the court's order was entered on February 15, 2002. App. F, 40-41a.

On June 20, 2006, after the case had been scheduled for trial, defendant moved for summary judgment based solely on the claim that he was immune because MIH was immune. The trial court framed the question presented as whether defendant was immune under 42 U.S.C. § 11111(a)(1) or (a)(2) or both, and stated, "[f]rankly, based on the facts and circumstances of this case, the court does not consider this to be a close question". App. E, 27a, ¶ 3 & 4. The court held that defendant was immune under 42 U.S.C. § 11111(a)(1)(C) and (D) because he was "clearly 'under a contract or other formal agreement with the body' and without doubt 'a person who

participate[d] with or assit[ed] the body with respect to the action'", *see* App. E, 33a, ¶ 5, and that whether or not he was immune under 42 U.S.C. § 11111(a)(2) was moot, *id.* at 34a.

Defendant then moved for attorney's fees. The court awarded all costs and attorney's fees incurred after June 16, 2004, the date on which the Virginia Supreme Court refused plaintiff's petition for appeal in the MIH Case. App. B, 5a, ¶ 1.[4]

IV. DECISION OF THE VIRGINIA SUPREME COURT

The questions of whether 42 U.S.C. § 11111(a) provides two bases of immunity to a person who provides information to a professional review body, and therefore, whether Sections 11111(a)(1)(C) and (D) immunize a person who knowingly provides false information to the body if the body is immune, were presented to the Virginia Supreme Court. The court was also presented the question of whether 42 U.S.C. § 11113 authorizes an award of attorney's fees where plaintiff opposes immunity on a question of first

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[4] Plaintiff filed a motion to correct the record by filing an expanded statement of facts because the trial court's opinion contained many express or implied statements of fact that were incorrect or misleading, or were never before the court. Since defendant had not pierced the pleadings and the undelying facts were not at issue, plaintiff provided only a succinct statement of facts and attached only the Operating Room Data Base forms of the 7 cases defendant alleged had excessive operating times to show that each one had been misstated. The trial court denied plaintiff's motion. App. B, 5a, ¶ 2.

impression in the jurisdiction. The Virginia Supreme Court refused plaintiff's petition for appeal stating that it was of the opinion that there was no reversible error in the trial court's judgment. App. A, 1a.

REASONS FOR GRANTING PETITION

This case involves questions of statutory interpretation about a federal law that will affect how peer review is conducted and the relationships between hospitals and their medical staffs. The trial court held that 42 U.S.C. § 11111(a) provides two independent bases of immunity to persons who provide information to a professional review body about the competence of a physician. This holding means that person who knowingly provide false information will be immune if the body is held to be immune, and that was the effect of the holding in this case. By affirming the trial court's contruction of the HCQIA and award of attorney's fees against the plaintiff for challenging this interpretation, the Virginia Supreme Court has created federal protection for unwarranted peer review and given the statute an *in terrorem* effect that are likely to have detrimental, not beneficial, effects on the peer review process and inflict great harm on individual physicians in Virginia. Because the questions are of great importance to both the medical profession and the general public, this Court should, respectfully, decide them.

I. THE VIRGINIA SUPREME COURT'S CONSTRUCTION OF 42 U.S.C. § 11111(a) IS INCONSISTENT WITH THE TEXT, THE LEGISLATIVE HISTORY, AND THE EXPRESSLY STATED PURPOSE OF THE STATUTE AND LEADS TO AN ABSURD RESULT.

It is evident from the plain language and structure of 42 U.S.C. § 11111(a) that subsection 11111(a)(1) does not immunize individuals for providing information to a professional review body. Subsection 11111(a)(1) is captioned "Limitation on damages for professional review actions", and enumerates in general language categories of persons who are immune if the professional review body's actions meet the statutory standards set forth in 42 U.S.C. § 11112(a). *See* 42 U.S.C. § 11111(a)(1)(B)-(D), App. H, 48a. Nothing is said about providing information in Section 11111(a)(1). *Id.* Subsection 11111(a)(2), on the other hand, is captioned "Protection for those providing information to professional review bodies" and states that "no person" may be liable in damages under any law for providing information to such a body in any manner unless the person knowingly provides false information. *See* 42 U.S.C. § 11111(a)(2), App. H, 49a.

Under Section 11111(a), providing information to a professional review body is treated as a different type of activity from participating with or assisting the body with a professional review action, and the requirements of immunity for these two types of activities are different. *See* 42 U.S.C. § 11111(a)(1) and

(a)(2), App. H, 48a-49a This is hardly a remarkable. Just two terms ago, this Court said

> The definition of words in isolation... is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.

See Dolan v. Postal Service, 546 U.S. 481, 486 (2006); *accord FCC v. Nextwave Personal Communications, Inc.*, 537 U.S. 293, 311 (2003) (Breyer, J., dissenting) (observing that "[g]eneral terms as used on particular occasions often carry with them implied restrictions as to scope").

Therefore, although semantically "providing information" could mean "participating with" or "assisting the body with" that is not the meaning given to these terms in 42 U.S.C. § 11111(a).[5] Moreover, even if the language of 42 U.S.C. § 11111(a) were ambiguous, the well established canon of statutory interpretation, *expressio unius est exclusio alterius*, would preclude interpreting the more general terms

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[5] An external reviewer cannot "participate with" the professional review body's action, only assist the body, because only the governing body or committee of a hospital can take a professional review action. *See* 42 U.S.C. § 11151(11), App. H, 53a.

"participating with" or "assisting the body with" to include the more specific one, "providing information".

> It is a well-established principle of statutory construction (and of common sense) that ... when 'two words or expressions are coupled together, one of which generically includes the other, it is obvious that the more general term is used in a meaning excluding the specific one'.

See City of Columbus v. Ours Garage & Wreckservice, Inc., 536 U.S. 424, 445 (2002) (Scalia, J., dissenting) (quoting J. Sutherland, Statutes and Statutory Construction § 266, p. 349 (1891)).

On its face, section 11111(a) obviously provides two independent bases of immunity, but the bases of immunity apply to different activities and not the same activity. *See* 42 U.S.C. § 11111(a)(1) and (a)(2), App. H, 48a-49a. Nothing in Section 11111(a) implies that a person cannot engage in more than one type of activity and be immune for some actions but not others. For example, a member of a hospital's medical executive committee who participates in the decision to revoke a physician's privileges and later testifies at a hearing on the action, is engaged in two different types of activities. His participation in the decision to revoke privileges would be governed by 42 U.S.C. § 11111(a)(1)(D) and his testimony at the hearing covered by 42 U.S.C. § 11111(a)(2). See *Patton v. St. Francis Hosp.*, 581 S.E.2d 551, 557 (Ga.App. 2003). If such a person knowingly provided false testimony to a hearing panel, the person would not be immune for knowingly provided false testimony even if he or she

was immune for participating in the revocation of privileges because the body was immune. *Id.*[6]

A reviewer who renders purely opinions is not "providing information" and is not liable for defamation.[7] The reviewer may or may not assist the body with its actions by rendering opinions, discussing and explaining them, making recommendations, and so on. If he does, the reviewer is immune for assisting the body if the body is immune but not if he or she assists the body with actions that do not meet the

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[6] Since the physician did not provide false information, he was immune under section 11111(a)(2), but it is clear from the court's opinion that had he knowingly provided false information at the hearing he would not have been immune for that activity although he was immune for his participation in the revocation of the physician's privileges.

> Burdette's participation as a member of the peer review body is governed by the same immunity analysis as applies to the hospital [which the court found immune under 42 U.S.C. § 11111(a)(1)]...As a witness during the peer review process, Burdette is entitled to immunity unless he knowingly provided false information. *42 U.S.C. § 11111* (a) (2).

Patton, 581 S.E.2d at 557.

[7] Although there is "no constitutionally-required 'opinion' exception" to state law of defamation, *see Milkovich v. Lorain Journal*, 497 U.S. 1, 10 (1990), expressions of opinion are not actionable in defamation under common law unless false statement of facts are implied by the opinion. *See e.g. Raytheon Technical v. Hyland*, 641 S.E.2d 84, 90-91 (Va. 2007). Whether a statement is one of fact or opinion is a question of law for the court. *Id.*

standards of 42 U.S.C. § 11112(a). This was the situation in *Singh v. Blue Cross/ Blue Shield of Massachusetts*, 182 F.Supp.2d 164 (2001), *aff'd* 308 F.3d 25 (1st Cir. 2002), on which the *Jenkins* court based its holding that 42 U.S.C. § 11111(a) provides two independent bases of immunity to a person who provides information to a professional review body. *Jenkins*, supra at *48.

In *Singh*, the district court was reciting the contentions of the defendant external reviewer, White, when it referred to two bases of immunity under Section 11111(a), and certainly never held that two sections of 42 U.S.C. § 11111(a) apply to the same activity. *Singh*, 182 F.Supp.2d at 175 ("White ...contends he is immune from liability under two provisions of the HCQIA"). Nor did the court find White immune under section 11111(a)(1)(D) for providing information to the Remedial Action Committee ("RAC") but "for his acts assisting the RAC in reaching its 'professional review actions'". These acts did not consist in providing information, much less knowingly providing false information, to the RAC. *Id.* On the contrary, the court expressly found that White had provided only opinions in his report and his opinions did not contain "undisclosed facts":

> White is entitled to summary judgment...Singh's contention that the disputed statements are not opinions is without merit. Each of the statements in the complaint obviously conveys the subjective opinions of a reviewing physician. Moreover, these opinions do not purport to convey undisclosed facts.

> Accordingly, Singh's defamation Count against White is dismissed.

Id. at 179.

A. Congress did not intend 42 U.S.C. § 11111(a)(1) to immunize persons who knowingly provide false information.

The lawmakers who drafted the bills that became the HCQIA distinguished between providing information and the other activities immunized if the body is immune throughout the amendment process. H.R. 5110 was the predecessor of H. R. 5540 that, after further amendments, was enacted into law.[8] *See* App. K, 59a-62a. Under the immunity provisions of H.R. 5110, Sec. 101 (a), the following would have been immune if the professional review body's actions met the standard in the bill:[9]

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[8] The original bill, H.R. 4390, 99th Cong., 2d Sess, was refined and introduced as H.R. 5110. H.R. 5110 was then amended and introduced as H.R. 5540, an amended version of which was then passed as an amendment to a larger bill. *See* Susan Horner, *The Health Care Quality Improvement Act of 1986: its History, Provisions, Applications and Implications*. 16 Am. J. L. and Med. 455, 455 n.4 (1990).

[9] These standards were amended and not the same as in 42 U.S.C. § 111112(a). *See* App. K, 61a, Sec. 102(a); App. H, 50a, 42 U.S.C. § 11112(a).

(1) the professional review body;

(2) any person acting as a member or staff to the body;

(3) any person under a contract or formal agreement with the body;

(4) any person who participates with or assists the body with respect to the action; and

(5) any person, who without knowledge of the falsity of the information provided, who provides information to the professional review body *with respect to the action*.

App. K, 60a. Manifestly, the drafters of H.R. 5110 did not mean by "provides information" the same thing as "assists the body with respect to the action" but distinguished these activities from the outset, and conditioned immunity of those engaged in these activities on different factors. *See Pittston Coal Group v. Sebben*, 488 U.S. 105, 133 (1988) (Stevens, J., dissenting) ("to understand the meaning of a statutory text, one must at least understand the way in which the drafters used and understood the words they chose').

The only requirement for immunity in H.R. 5110 of persons now covered by 42 U.S.C. § 11111(a)(1)(B)-(D) was that the body's action met the standards in the bill. App. K, 60a, Sec. 101(a) and 61a, Sec. 102(a). Persons who provided information to the body were only immune if the body was immune *and* they did not knowingly provide false information. App. K, 60a, Sec.

101(a)(5). Therefore, a person who knowingly provided false information to the body would not have been immune under H.R. 5110 even if the body was immune. *Id.* That is the situation in this case.

Congress did not, of course, enact H.R. 5110. Sections 101(a)(1)-(a)(4) were enacted without change in language and codified as 42 U.S.C. § 11111(a)(1)(A)-(D), but Section 101(a)(5) was carved off and enacted and codified as 42 U.S.C. § 11111(a)(2). *See* App. K, 60a; App. H, 48a-49a. However, the only substantive change Congress made in amending Section 101(a)(5) was to remove the requirement that the body had to be immune for immunity to attach to persons who provide information to the body. *Id.* Under Section 11111(a)(2), no one providing information to a professional review body can be held liable "by reason of having provided such information" unless the person knowingly provided false information. App. H, 49a. Immunity of the body is now irrelevant to the immunity of such persons.

The purpose of carving off Section 11111(a)(2) from the subsections of § 11111(a)(1) was to ensure that persons who provided information to a professional review body would not be liable if the body was not immune as this might otherwise deter such persons from providing the information given that they usually have no control over the body's actions and activities. *See* H.R.Rep. No. 903, 99th Cong., 2d Sess. 10, reprinted in 1986 Code Cong. & Admin.News 6391-92. It was not to immunize persons who knowingly provided false information to a professional review body. On the contrary, Congress amended H.R. 5110, and then H.R. 5540, in response to concerns that the

immunity provisions would protect legitimate as well a illegitimate peer review. *See* Scott, supra at 329-332; 132 Cong. Rec. H9960 (daily ed. Oct. 14, 1986) ("the bill...does not create an incentive to more effective voluntary peer review, it would instead shield illegal peer review action from effective challenges brought by those doctors who find themselves improperly sanctioned by peer review committees.") (statements of Rep. Edwards). Although racial discrimination and anticompetitive conduct were prominent concerns, they were not the only ones. Representative Waxman, a co-sponsor of H.R. 5110, stated that

> an action taken against a physician because of a style of practice or a pattern of patients that does not generate sufficient revenue for a hospital would not be covered by this bill.

See Scott, supra at 330, n.61 (1991) (citing 132 Cong. Rec. H9959 (daily ed. Oct. 14, 1986)).

B. The trial court's construction of 42 U.S.C. § 11111(a) leads to an absurd result.

Even if 42 U.S.C. § 11111(a)(1) could be read to immunize persons who knowingly provide false information to a professional review body such a construction would have to be rejected as absurd.[10]

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[10] To the extent that anyone who knowingly provides false information pursuant to a valid contract would likely be in breach of the contract, and providing false information would not assist any legitimate professional review action of a hospital, it is doubtful that even a literal reading of these provisions, plucked

This Court has said repeatedly that in construing a statute the court's task "is to interpret the words in light of the purposes Congress sought to serve", *see Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979), and that it will avoid literal interpretations that lead to absurd results if alternative constructions consistent with statutory language and legislative purpose are available, *see Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 551 (1982) (citing *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 542-543 (1940); *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940)). Absurd results are not results that are merely harsh. *See Griffin*, 458 U.S. at 575 (citing *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)); *Nixon v. Missouri Municipal League*, 541 U.S. 125, 141 (2004) (Scalia, J., joined by Thomas, J., concurring) ("avoidance of unhappy consequences is [not] an adequate basis for interpreting a text"); *Olympic Airways v. Husain*, 540 U.S. 644, 664 (2004) (Scalia, J., dissenting) (legal construction is not fallacious because it yields harsh results). They are ones Congress could not possibly have intended and are obviously absurd to everyone. *Small v. United States*, 544 U.S. 385, 404 (2005) (Thomas, J., joined by Justices Scalia and Kennedy, dissenting). A construction of federal law that immunizes persons who knowingly make false statements to a hospital

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from their context, could be read to immunize persons who knowingly provide false information to a professional review body under 42 U.S.C. § 11111(a)(1)(C) and (D). Any contract or agreement to provide a report that contains false information to injure another would be void as a matter of public policy.

about a physician's cases and management is such a result.

Even the *Jenkins* court found its own holding "troubling", but evidently because of its harshness, not its absurdity. *Jenkins*, supra at *48 n. 8. Because the court concluded that the harshness of immunizing persons who knowingly provided false information would be mitigated if the hospital's actions met the standards of 42 U.S.C. § 11112(a), the court held that it was appropriate to immunize persons who provide false information.

> It is initially troubling that a person who fails to qualify for immunity under the specific requirements of *§ 11111(a)(2)* because he knowingly provided false information to a professional review body should nonetheless be afforded immunity if the professional review action based on that false testimony meets all the standards specified in *§ 11112(a)*. However, upon further consideration, the Court notes that, if a professional review action is taken according to the standards in *§ 11112(a)*, the negative effects of a person's false testimony will be minimized, thus rendering immunity appropriate.

Jenkins at 48 n.8.

Even accepting the validity of this method of statutory interpretation, the defamatory impact of a report like defendant's is not mitigated by a finding of immunity in Virginia. In the MIH case on which immunity in this case is based, the defendants urged the courts to apply, not the objective reasonableness

standards of 42 U.S.C. § 11112(a), but the deferential standard of non-review adopted by the Virginia Supreme Court in *Khoury v. Community Memorial Hospital, Inc.*, 123 S.E.2d 533 (Va.1962) and *Medical Center Hospital v. Terzis*, 367 S.E.2d 728 (Va. 1988). *See* App. K, 63a.[11] The trial court applied a subjective, deferential standard that ignored the sufficiency of plaintiff's evidence entirely.

> Plaintiff's major complaint is that Defendants relied on opinions which his evidence clearly shows were wrong. The stark reality of this is that the professionals involved in the peer review process received all the evidence as presented and selected what they believed to be the credible, salient, relevant, material evidence and based their conclusions thereon. The court cannot say that the result of the peer review undertaken by these professionals based on the evidence before them was unreasonable.[12]

Compare Scott, supra at 381 ("judge must decide, not whether she believes that the defendants more probably than not did not comply with the four immunity standards, but rather whether a rational

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[11] This same standard was urged on the trial court in *Meyers v. Riverside Hospital, Inc.*, a related case in which plaintiff has also petitioned for a Writ of Certiorari.

[12] In Virginia, where conflicting inferences can be drawn from undisputed facts, those favoring the non-moving party must be drawn, and if such inferences would allow the non-moving party to prevail at trial, summary judgment is improper. *See Pugh v. Commonwealth*, 292 S.E.2d 339, 341 (Va. 1982).

jury could so find on the evidence presented by the plaintiff"); *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 149-51 (2000) (court should credit non-moving party's evidence and only the evidence of the movant that a jury is required to believe) (not a HCQIA case).

Interpreting 42 U.S.C. § 11111(a)(1) as immunizing persons who provide information if the body is immune protects persons who knowingly provide false information and leads to an absurd result that does not effectuate the purpose for which the immunity provisions of 42 U.S.C. § 11111(a) were enacted. Congress enacted the HCQIA to encourage effective peer review. *See* 42 U.S.C. § 11101(5), App. H, 48a. No one can reasonably believe that knowingly providing false information to a hospital about a physician's cases would contribute to effective peer review. *See Boczar v. Manatee Hosp. & Health Sys. Inc.*, 993 F.2d 1514, 1518 (11th Cir. 1993) ("fabricating damaging incidents or purposeful overreacting would be conduct that no reasonable medical practitioner or hospital could believe to be part of legitimate peer review").

By affording persons who provide information to a professional review body greater protection than is accorded even political speech about public figures, Congress has already wrung out every drop of incentive to engage in peer review that is to be had from immunizing peer reviewers. *See* 42 U.S.C. § 11111(a)(2), App. H, a (requiring knowledge of falsity for liability to attach); *compare New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (can only be liable for defaming public official if defamatory statement made with reckless disregard of whether it was true or

not). Because immunity is lost only if false statements are made with knowledge of falsity, no one need fear liability for making mistakes or even recklessly making factually false representations to a professional review body that are untrue. To suggest that more is required to encourage effective peer review is utterly absurd.

In this case, defendant did more than provide baseless, subjective opinions critical of plaintiff. He made factually false representations about plaintiff and his cases that he contrived and did not correct after he was notified of which specific statements in his report were factually untrue. And the reason defendant did not correct the false statements is that he made them deliberately and consciously, changing his report to drive home its required effect with falsehoods. And to insure that the intended effect of the falsehoods would not be mitigated, he deleted all positive statements from the original draft of his report.

The trial court attempted to distance itself from the import of its holding by ignoring both the cases on which defendant relied, *Jenkins* and *Singh*, and by likening the present case to decisions from other jurisdictions in which the courts found no evidence that false statements had been made about the plaintiff or found that the defendant doctor had expressed only opinions about plaintiff's medical care,[13] but this was gratuitous *dictum* because the

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[13] *See Fox v. Parma Community Gen. Hosp.*, 827 N.E.2d 787, 795 (Ohio. Ct. App. 2005) ("[a]absolutely no evidence" that "critical

underlying merits of the allegations were not before the court. Defendant did not move for summary judgment asserting truth as a defense or base his claim of immunity on the ground that he did not know that any statements in his report were false. *See* App. J, 55a-58a. And defendant's demurrer alleging that his report contained only opinions was overruled. App. F, 40a, ¶ 3. The sole basis on which defendant claimed immunity was that the court held MIH to be immune. Under the Act Congress enacted, a professional review body's immunity does not immunize a defendant who has knowingly made false statements to the body. *See* 42 U.S.C. § 11111(a)(1), (2), App. 48a-49a.

II. THE STATE COURTS INTERPRETED 42 U.S.C. § 11113 IS INCONSISTENT WITH THIS COURT'S PRECEDENT.

The state courts in this case have taken a quantum leap in dismantling the protection Congress erected against misuse of federal immunity to shield unwarranted disciplinary actions against physicians

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material facts were falsified" as alleged); *Sithian v. Staten Island Univ. Hosp.*, 734 N.Y.S.2d 812, 816 (N.Y. Sup. Ct. 2001) *aff'd* 724 N.Y.S.2d 906 (N.Y. App. Div. 2001) (no evidence to support plaintiff's conclusory assertion of malice against physicians who expressed opinion that plaintiff's treatment did not comport with accepted standards), *see* App. E, 27a-33a; *Shilling v. Moore*, 545 N.W.2d 442, 445 (Neb. 1996) (chairman of department expressed opinion about plaintiff's fitness for reappointment to credentials committee); *Impereal v. Suburban Hosp. Ass'n, Inc.*, 37 F.3d 1026, 1029 (4th Cir. 1994) (chairman of department stated to executive committee that he could not in good conscience recommend plaintiff for reappointment), *id.* at 35a-37a.

by sanctioning plaintiff for opposing an absurd interpretations of 42 U.S.C. § 11111(a) on a question of first impression in Virginia. In so doing they have disregarded this Court's precedent in *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 423-24 (1978) and the decisions of every federal appellate court that has considered sanctions under 42 U.S.C. § 11113.

An award of attorneys fees under 42 U.S.C. § 11113 is reviewed "in the same manner as [the court] review[s] the award of attorney fees under Title VII and 42 U.S.C . § 1988". *Muzquiz v. Foote Memorial Hosp.*, 70 F.3d 422, 431-32 (6th Cir. 1995).[14] In the context of a claim for attorney's fees under Title VII, this Court has said that an award of attorney's fees is not appropriate where the defendant prevails on a case of first impression requiring judicial resolution. *See Christiansburg Garment Co.*, 434 U.S. at 423-24; *accord Sugarbaker v. SSM Health Care*, 187 F.3d 853, 857-58 (8th Cir. 1999) (hospital not entitled to attorney's fees, because no eighth circuit precedent addressed the standards for HCQIA immunity).

In this case, the trial court conceded that there was no Virginia precedent on the question presented by defendant's motion for summary judgment. App. E, 27a, ¶ 5. Nor is there any precedent from any

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[14] 42 U.S.C. § 11113 was drafted in language taken directly from the National Cooperative Research Act of 1984, 15 U.S.C. § 4303. *See* 132 Cong. Rec. II 11591 (daily ed. October 17, 1986) (statements of Rep. Waxman). That language was in turn based on the cost shifting provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k). *See* Scott, supra at 338-39.

jurisdiction holding that 42 U.S.C. § 11111(a) provides two independent bases of immunity to persons who provide information to a professional review body, and, therefore, that such persons are immune if the body is held to be immune, and none of the cases cited by the trial court so held. *See Fox*, 827 N.E.2d at 795; *Sithian*, 734 N.Y.S.2d at 816; *Shilling*, 545 N.W.2d at 445; *Impereal*, 37 F.3d at 1029.

Before awarding attorney's fees to a prevailing defendant, the trial court must make factual findings that support a conclusion that the plaintiff's claim(s) or the conduct of the litigation were frivolous, unreasonable, without foundation or in bad faith, 42 U.S.C. § 11113; *Canady v. Providence Hosp.*, 1997 U.S. App. LEXIS 34885 (D.C. Cir. 1997), and the record must actually support such a conclusion, *Impereal v. Suburban Hosp. Ass'n*, 1998 U.S. App. LEXIS 893 at *3-6 (4th Cir. January 22, 1998) (unpublished opinion). In making factual findings to determine if plaintiff's claim was reasonable, this Court has admonished trial courts to resist the temptation to engage in *post hoc* reasoning and hindsight logic that would deter all but the most airtight claims. *See Christiansburg Garment Co.*, 434 U.S. at 421-22; *accord Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 642 (3d Cir. 1996) (important to avoid hindsight logic and conclude that because "plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation") (citing *Muzquiz*, 70 F.3d at 432).

Defendant prevailed solely because the court found him immune. Plaintiff's underlying claim was meritorious and his legal position on the interplay between 42 U.S.C. § 11111(a)(1) and (a)(2), even if

incorrect, was not frivolous. By awarding attorney's fees, the state courts in this case have adopted an incorrect standard under 42 U.S.C. § 111113, and have given the statute an *in terrorem* effect it was never intended to have. The decision can be expected to provide further incentives to abuse the immunity provisions of HCQIA to shield improper peer review. *See* Note: *The Fox Guarding the Henhouse: How the Health Care Quality Improvement Act of 1986 and State Peer Review Protection Statutes Have Helped Protect Bad Faith Peer Review in the Medical Community*, 18 J. Contemp. Health L. & Pol'y 239, 252-53 (2001) (discussing evidence that peer review is often misused but protected by federal and state immunity statutes).

III. THE QUESTION IS IMPORTANT

The quality of medical care and its oversight are obviously matters of great concern to the general public and the medical profession alike. Physicians themselves oversee the quality of care rendered by their peers, and Congress enacted the HCQIA to encourage them to do so by immunizing them from liability for peer review actions that meet certain criteria. The trial court's construction of the HCQIA creates new immunities Congress never intended, and the Virginia Supreme Court has approved this construction. This new interpretation of 42 U.S.C. § 11111(a) protects even persons who knowingly provide false information to peer review bodies and can be expected encourage abuses of the peer review process. The threshold question is whether the issue is of sufficient importance to warrant this Court's attention.

Unwarranted peer review is far more common than generally recognized or supposed. *See* William W. Parmley, *Clinical Peer Review or Competitive Hatchet Job*, 36 J. Am. J. Coll. Cardiol. 1 (2000). Indeed, the conduct of the peer reviewers in the Oregon antitrust case that precipitated the introduction of the bill that was eventually enacted as the HCQIA,[15] was described by the Ninth Circuit as "shabby, unprincipled and unprofessional", *see Patrick v. Burget*, 800 F.2d 1498, 1509 (9th Cir. 1986), *rev'd* 486 U.S. 94 (1988), and the sponsors of the bill subsequently acknowledged that the "bad faith peer review activities permitted by the *Patrick* case would never obtain immunity under H.R. 5540", *see* 132 Cong. Rec. H11590 (daily ed. Oct 17, 1986) (statements of Rep. Waxman).

These are important observations for no evidence besides the trial verdict in *Patrick* was ever presented to Congress that fear of antitrust or any other litigation actually deterred physicians from engaging in peer review.[16] This is relevant because the HCQIA

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[15] *See Health Care Quality Improvement Act of 1986: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. (Oct. 8 and 9, 1986) at 27 ("A primary impetus for [the bill's] immunity was the substantial damage award, including treble damages, made by an Oregon Federal district court jury in the case of Patrick v. Astoria Clinic (sic)") (Statement of Rep. Edwards, Chairman). The case referred to was *Patrick v. Burget*, C.A. No. 81-260 EL, filed in the U.S. District Court for the District of Oregon.

[16] None of the 22 witnesses who testified before the Subcommittee on Health and the Environment of the Committee on Energy and Commerce of the House of Representative during the Hearings on

does not contain any actual incentives to engage in peer review and only removes a putative disincentive. *See* 132 Cong. Rec. H9964 (daily ed. Oct. 14, 1986) ("Perhaps most troubling, there is no mechanism in H.R. 5540 to guarantee that physicians will, in fact, participate in more peer review if the bill is passed.") (statements of Rep. Rodino). It is against this backdrop that the potential consequences of protecting unwarranted peer review must be assessed.

Since the HCQIA was enacted, it has become clear that even good faith peer review, as traditionally practiced, has been ineffective at protecting patients. *See* Linda T. Kohn, et al. eds., *To err is human: Building a Safer Health System* (2000) (reporting that deaths from iatrogenic injuries are the eighth most common cause of death in America); *accord* Wilson R.M., et al., *The Australian Quality of Health Care Study*, 163 Med. J. Aust. 458 (1995) (finding that 16.7% of hospital admissions in Australia were associated with iatrogenic patient injury). The recognition that most errors are not cause by "bad apples" and the kind of egregious incompetence and

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H.R. 5110 cited any successful law suits (besides the Patrick case which was on appeal when hearings on H.R. 5110 were held) brought by disciplined physicians or named any specific individuals who had refused to engage in peer review out of fear of incurring legal liability. On the contrary, Mr. Jack Owens, Executive Vice President, American Hospital Association, acknowledged that "plaintiff-physicians rarely have prevailed in these cases", *Hearings on H.R. 5110* at 276, and Mr. John Horty, President of the National Council of Community Hospitals, conceded that "hospitals are, with only rare exceptions, successful in defending such cases", *id.* at 297.

professional conduct that concerned Congress during debates on the H.R. 5110, has clarified why traditional peer review has not worked.[17] The causes of medical errors and the institutional changes required to protect patients from iatrogenic injuries and errors are now also better understood. *See* Lucian L. Leape, *Errors in Medicine*, 272 JAMA 1851, 1857 (1994) (stating, "it is apparent that the most fundamental change that will be needed if hospitals are to make meaningful progress in error reduction is a cultural one...Errors must be accepted as evidence of system flaws, not character flaws").

All these developments would be of little relevance to a court faced only with the correct interpretation of a federal statute, but this Court is faced with the preliminary question of whether the matter is important enough to warrant its attention. Obviously, it is for Congress, not this Court, to correct any deficiencies in legislation, but what is at issue here is not a defective statute but its defective interpretation by a state court. What will be the effect of protecting unwarranted peer review that unquestionably occurs? *See Meyer v. Sunrise Hosp.*, 22 P.3d 1142, 1153-54

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[17] Saul N. Weingart, et al., *Epidemiology of medical error*, 320 BMJ 774 (2000) (stating that examples of malevolent providers are rare, and that there is little evidence that medical errors are due to "bad apples"); Thomas W. Nolan, *System changes to improve patient safety*, 320 BMJ 771 (2000) (stating that most errors are not committed by incompetent or unprofessional physicians but by individuals who are capable of performing the task safely, who had performed the task safely on many prior occasions, and who face significant personal consequences for the errors - i.e. have an incentive to avoid them).

(Nev. 2001) ((Shearing, J., joined by Justice Rose, concurring).

"A house divided against itself cannot stand". *See* Abraham Lincoln, Springfield, Il, June 16, 1858. Organizations that engage in unwarranted peer review do not engage in effective peer review. Unwarranted peer review is symptom of dysfunction. Laws that protect unwarranted peer review do not protect the public; they expose the public to harm in as much as they impede the changes necessary to implement effective peer review that protects patients. All human factors experts and experts in patient safety would agree that legal protection of unwarranted peer review will undermine the very purposes for which the HCQIA was enacted, because they have warned that even good faith peer review as traditionally practiced does not work.

> [A] culture of blame [which is] operationalized in terms of pursuit of culprits, threats of disciplinary actions, and threats of stigmatization degrades performance, cooperation and learning...[and] blame [even if disguised as accountability] drives out information about systemic vulnerabilities, stops learning, and undermines the potential for improvement.

See Testimony of David Woods at the National Summit on Medical Errors and Patient Safety Research, available on-lineatwww.apa.org/ppo/issues/smederrors.html

> [The traditional approach to medical error of holding accountable and punishing the person who makes an error] is effective in dealing with the occasional irresponsible or poorly motivated clinician, [but] it ignores the evidence that most medical errors are not caused by negligence but rather by professionals that are otherwise conscientious and competent.
>
> [This approach] is consistent with a simple (and therefore easy to understand) model of human behavior in which single events have single causes that originate in individuals.
>
> The problem with this approach...is that it doesn't work.

See Ownby, at 12.

With this brief synopsis, plaintiff is not asking the Court to put on the robes of human factors experts and decide policy on patient safety. He is merely urging that the incentives created by the construction of a statute that gives federal protection to persons who knowingly provide false information to a hospital will work sufficient social mischief to warrant this Court's attention. Harm will be inflicted not only on doctors like plaintiff but on the general public as well, even if the nature of that harm is less obvious.

Plaintiff is also not asking the Court to rewrite the HCQIA, but only to ensure that the courts of Virginia apply the immunity Congress actually enacted. Only this Court can correct the Virginia Supreme Court's

construction of 42 U.S.C. § 11111(a), and, respectfully, it should do so.

CONCLUSION

For all the foregoing reasons, petitioner, Paul J. Meyers, M.D., respectfully asks this Court to issue a Writ of Certiorari to the Supreme Court of Virginia.

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APPENDIX

APPENDIX A

SUPREME COURT OF VIRGINIA

Record No. 070775
Circuit Court No. CL01-31259-EHtTF

[Filed October 26, 2007]

Paul J. Meyers, M.D.,	)
Appellant,	)
	)
against	)
	)
John R. Partridge, M.D.,	)
Appellee.	)
	)

From the Circuit Court of the City of Newport News

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/
Deputy Clerk

APPENDIX B

CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS, VIRGINIA

At Law No. CL01-31259EHtTF

[Filed March 13, 2007]

PAUL J. MEYERS, M.D., Plaintiff,	)
v.	)
JOHN R. PARTRIDGE, M.D., Defendant.	)

FINAL JUDGMENT ORDER

On the 19th day of December 2006, came the parties, by counsel, for arguments before the Court on Defendant's Motion for Attorneys' Fees pursuant to 42 U.S.C. § 11113 and on the Plaintiff's Motion to File a "Statement of Facts," and the Plaintiff's Motion to Strike the Affidavit of Gregory N. Stillman, Esquire, which was filed as a part of Defendant's Motion for Attorneys' Fees.

UPON CONSIDERATION WHEREOF, on August 2, 2006, the Court issued its opinion awarding summary judgment to the defendant, a copy of which

is attached hereto and incorporated herein by reference, and on September 15, 2006, this Court entered an Order granting the Defendant's Motion for Summary Judgment and suspending the execution of said judgment pending the Petition for Attorneys' Fees to be filed by defendant, a copy of which Order is also attached and incorporated herein by reference. Thereafter, the defendant filed his Motion for Attorneys' Fees and brief and affidavits in support thereof. The plaintiff filed a brief, with exhibits, in opposition and the defendant filed a reply. Plaintiff also filed an Affidavit of Nicholas Kadar, a Motion to Strike the Affidavit of Gregory N. Stillman, Esquire and a Motion to File a "Statement of Facts." The defendant filed an Opposition and Objection to the plaintiff being granted leave to file the "Statement of Facts" and a brief in support thereof and also filed an Opposition to the plaintiff's motion to strike the Stillman Affidavit.

The Court considered all of the above-referenced motions and briefs, with exhibits, and the arguments of counsel at the hearing before the Court on December 19, 2006 and, subsequent to the hearing, the Court received a copy of a decision of the United States Court of Appeals for the Sixth Circuit referenced by plaintiff's counsel in the oral argument and submitted by the plaintiff at the request of the Court as well as a Supplemental Affidavit for attorneys' fees from counsel for the defendant dated December 21, 2006, both of which the Court considered. On January 11, 2007, the Court issued its Opinion Letter, a copy of which is attached hereto and incorporated herein by reference. It is therefore

ADJUDGED, ORDERED AND DECREED that the suspension of the execution of summary judgment for the defendant in the September 15, 2006 order is lifted, the Defendant's Motion for Summary Judgment is granted and summary judgment is awarded to the Defendant, the Defendant's Petition for Attorneys' Fees and Costs is granted in part and the Defendant, John R. Partridge, M.D., is awarded a judgment against the Plaintiff, Paul J. Meyers, M.D., in the total amount of $96,226.86, comprised of attorneys' fees in the amount of $87,971.35 and costs in the amount of $8,255.51 incurred during the period from June 16, 2004 through December 20, 2006, ~~and additional attorneys' fees of $_____ and litigation expenses of $_____ from December 21, 2006 through _____, 2007~~. Interest shall run on the judgment awarded at the legal judgment rate of six percent (6%) per annum as provided in Va. Code § 6.1-330.54 from the date of the entry of this Judgment Order until paid. It is further

ADJUDGED, ORDERED AND DECREED that the Plaintiff's Motion to File a "Statement of Facts" is denied and the Plaintiff's Motion to Strike the Affidavit of Gregory N. Stillman, Esquire is denied.

The plaintiff's objections and exceptions to the rulings of the Court as contained in all motions, briefs, memoranda and arguments of the plaintiff, including its counsel, are noted and preserved.

ENTERED this 13t day of MARCH 2007

/s/

JUDGE

I ASK FOR THIS:

/s/
Hunter W. Sims, Jr., Esquire (VSB #09218)
Kristan B. Burch, Esquire (VSB #42640)
Kaufman & Canoles, P.C.
150 West Main Street, Suite 2100
Norfolk, Virginia 23510
Phone: (757) 624-3000
Fax: (757) 624-3169
Counsel for Defendant John R. Partridge, M.D.

SEEN AND OBJECTED TO AS NOTED:

/s/
Terrence K. Martin, Esquire
714 J Clyde Morris Boulevard
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Newport News, VA 23601
Phone: (757) 599-9822
Fax: (757) 599-9824
Counsel for Plaintiff Paul J. Meyers, M.D.

APPENDIX C

Seventh Judicial Circuit
COMMONWEALTH OF VIRGINIA

TIMOTHY S. FISHER
JUDGE

2501 HUNTINGTON AVENUE
CIRCUIT COURTROOM FIVE
NEWPORT NEWS, VIRGINIA 23607
(757) 926-8828

January 11, 2007

Nicholas Kadar, Esquire
11 Jackson Court
Cranbury, NJ 08512

Terrence K. Martin, Esquire
714 J. Clyde Moms Boulevard
Suite 140
Newport News, VA 23601

Hunter W. Sims, Jr., Esquire
Kristin Burch, Esquire
Kaufman & Canoles, P.C.
150 West Main Street, Suite 2100
Norfolk, VA 23510

Re: Paul J. Meyers, M.D. v. John R. Partridge, M.D.
Law No. 31259EHtTF

Dear Counsel:

On December 19, 2006 at 10:00 a.m. the court heard arguments on the defendant's Motion for Attorney's Fees pursuant to 42 U.S.C. 11113.

The plaintiff had submitted a "Statement of Facts" prior to the last hearing in this matter on September 15, 2006.

The basis for the plaintiff moving to "file" a "Statement of Facts" was unclear on September 15 and the issue was not clarified at the hearing on December 19, 2006.

Plaintiff's counsel represented a notice had been filed for the plaintiff's request for the entry of an order permitting the "filing" of a "Statement of Facts" which notice the court had not received as of the hearing on December 19, 2006 at 10:00 a.m.

Nevertheless, the court inquired of the defendant as to their position on the plaintiff "filing" a "Statement of Facts" to which the defendant objected and said objection by the defendant was sustained.

At the conclusion of the hearing on December 19th I received a letter dated December 14, 2006, with a notice of hearing attached from the plaintiff which was filed in the Clerk's Office on December 19, 2006, at 10:22 a.m.

Presumably it had been mailed from the plaintiff's attorney's office in New Jersey but was not received by

the clerk's office until during the hearing on December 19, 2006.

Regardless, the plaintiff's motion to file a "Statement of Facts" is denied.

The defendant moved to strike the affidavit of Gregory Stillman, Esquire which was filed as part of the defendant's motion for attorney's fees. The ground for the objection was Mr. Stillman's alleged specific lack of experience with the Health Care Quality Improvement Act.

Although not raised by the plaintiff, the court noted, *sua sponte*, that Mr. Stillman, though a respected attorney not only in the Tidewater area but most likely the Commonwealth of Virginia; was also an attorney involved representing other defendants who had been the subject of suit by the plaintiff in this case.

The court simply observed that status as a potential conflict of interest; however, no objection was raised by the plaintiff on that basis so the objection to the affidavit of Mr. Stillman, who was present in court, otherwise objected to by plaintiff is overruled. Mr. Stillman's professional expertise in the area of civil litigation was not challenged.

The affidavit of Mr. Stillman will be accepted and he will be accepted as an expert witness by the court concerning the reasonableness of the fees requested by the counsel for the defendant.

It should be noted that plaintiff had no objection to the factual basis of the claim for attorney's fees by counsel for defendant and did not object to the number of hours being expended as claimed and did not further object to the hourly fee being unreasonable.

(The only exception to plaintiff's lack of objection to the "factual" basis for the attorneys' fees claim of defendant was raised at the hearing by plaintiff's counsel claiming defendant should have filed the motion for summary judgment sooner. The position of plaintiff was phrased as some sort of intentional delay by defendant to increase the attorneys' fees claim. A position not sustained and somewhat tinged with irony.)

Subsequent to the hearing as both parties are aware, the court received a copy of a decision of the Sixth United States Circuit Court of Appeals from the plaintiff for consideration and the updated petition for attorneys' fees with affidavit of counsel for the defendant dated December 21, 2006 both of which have been considered by the court.

42 U.S.C. section 11113 states as follows:

Payment of Reasonable Attorney's Fees and Costs in Defense of Suit

In any suit brought against the defendant, to the extent that a defendant has meet the standard as set forth under §412(a) and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against

> any such claim the costs of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith....

The defendant's Motion for Summary Judgement was granted by the court by order entered September 15, 2006 incorporating the court's letter opinion of August 2, 2006 which execution of said judgment was suspended pending the petition for attorney's fees filed and now considered herein.

As such the defendant, John R. Partridge, M.D. has "substantially prevailed" against the plaintiff, Paul J. Meyers, M.D..

The United States Court of Appeals for the Eighth Circuit in *Sugarbaker v. SSM Healthcare*, described the decision making process for granting attorney's fees pursuant to this section as follows:

> By its plain language, §11113 of the HCQIA involves three separate inquiries. First, the court must decide whether the defendant has satisfied the standards identified in §11112(a). In other words, the peer review process must qualify for HCQIA immunity. Second, the defendant must substantially prevail. Third, the court must decide whether the plaintiff's claim or litigation conduct was frivolous, unreasonable, without foundation, or in bad faith. 187 F. 3d 853, 857 (1999).

The instant case is a suit by the plaintiff Paul J. Meyers, M.D. against the defendant John R. Partridge, M.D.

However, the entity involved which had to satisfy the standards for HCQIA immunity was Mary Immaculate Hospital which was determined have met the statutory standard for HCQIA immunity in a separate but related case by a judgment order entered December 1, 2003; incorporating a letter opinion dated September 5, 2003. The Supreme Court of Virginia denied the petition for appeal filed in that case by order of the Supreme Court dated June 16, 2004. (*Meyers v. Mary Immaculate Hospital, et al*, Law No. 31395-EH, Newport News Circuit Court)

That decision resolved the issue that Mary Immaculate Hospital was entitled to HCQIA immunity and the issue in the instant case to be resolved was whether Dr. Partridge, as an expert retained by Mary Immaculate Hospital to review certain medical records as part of the peer review process by Mary Immaculate Hospital, would then be entitled to immunity under the Healthcare Quality Immunity Act.

This court by order entered September 15, 2006 incorporating a letter opinion of August 2, 2006 determined that Dr. Partridge was entitled to the immunity under the Healthcare Quality Immunity Act.

Defendant Mary Immaculate Hospital and other defendants in the prior related case also sought costs and counsel fees under the Healthcare Quality Immunity Act. (*Meyers v. Mary Immaculate Hospital*,

et al, Law No. 31395-EH, Newport News Circuit Court)

The court by order dated December 1, 2003 incorporating the court's letter opinion of November 18, 2003 denied defendants' request for attorney's fees stating that, "The court does not find that plaintiff's proffered causes of action are so devoid of factual interpretation as to be declared frivolous, unreasonable, without foundation or in bad faith." It should also be noted that there was either no request; but, certainly no award of attorneys' fees from the Supreme Court of Virginia relative to the appeal filed by Dr. Meyers in the case against Mary Immaculate.

Accordingly, the court will limit its examination to the award of attorneys' fees, if at all, in this case to the actions of the plaintiff subsequent to the denial of his petition for appeal in the related case by the Supreme Court of Virginia on June 16, 2004.

The court would observe that without explicitly being in agreement to such a threshold, both counsel for the plaintiff and counsel for the defendant appeared to indicate there certainly was a basis for this court not going behind the earlier decision upon which the present court's granting of the defendant's Motion for Summary Judgment is based considering the previous request for attorneys' fees relative to the facts which have led us to this point was not granted.

The question then to be answered is what effect, if any, the decision in the related case should have had on the activities of either party in this case.

It is important to note at this point that there is no contradiction to the uncontroverted fact that Mary Immaculate Hospital suspended the plaintiff only after becoming aware that Riverside Regional Medical Center (a defendant in other cases) had suspended the plaintiff's privileges after a review of a certain number of medical records of patients treated by the plaintiff at Riverside.

It is uncontroverted that Dr. Partridge was hired by Mary Immaculate to review the records utilized by Riverside for Mary Immaculate Hospital to determine independently whether the suspension of Riverside was appropriate and whether their continued suspension of Dr. Partridge was appropriate since their suspension was based solely on the action taken by Riverside.

There are no facts to suggest that Dr. Partridge was involved in the original suspension of Dr. Meyers by Riverside or did anything in this case other than review medical records which had been forwarded to him to participate in the peer review process.

The plaintiff contended that Dr. Partridge should have no immunity for making allegedly false statements as he was only "providing information" to the Board.

This court has found otherwise, but, it is interesting to note that on page 24 of plaintiff's brief opposing the motion for attorneys' fees, the plaintiff does state as follows: "Thus, Partridge is immune from liability for providing his opinions as to what proctorship would be suitable, given that MIH was

held to be immune. However, he is not immune from providing factually false information to MIH about Meyers and his patient care." On the same page the plaintiff contends that "Section 1111(a)(1)(C) applies to individuals with whom a hospital may contract to have cases reviewed, such as DoctorQuality.com through which Riverside retained (Dr.) Pritzker to review Meyers cases..." by stating, "Those who assist the professional review body or those who assist those who participate in the action by helping them reach a decision as to what recommendations to make to the Board of Trustees about the privileges of the physician in review-in making recommendations to the Board it is the only kind of professional review action the medical staff is authorized to take."

In other words, the plaintiff alleges that Dr. Partridge would be immune when making a recommendation that Dr. Meyer's privileges should be reinstated even though that would appear to be an inconsistent conclusion based upon the allegedly "defamatory per se" misstatements of fact, made by Dr. Partridge for which he would not have immunity.

Further, the plaintiff agrees that Riverside Regional Medical Center, the agency which originally suspended Dr. Meyers can hire an outside reviewer such as "DoctorQuality.com" to review cases and provide recommendations to the Board and be immune; however, when Mary Immaculate Hospital hires an outside external reviewer like the defendant Dr. Partridge that outside reviewer hired by Mary Immaculate Hospital does not enjoy the same immunity to which they concede the outside reviewer hired by Riverside must enjoy.

The schizophrenic nature of that argument can hardly escape notice.

Once Mary Immaculate Hospital established it's eligibility for immunity under the Healthcare Quality Improvement Act and plaintiff's petition was denied by the Supreme Court of Virginia; whether or not the initial filing of this suit against Dr. Partridge was justifiable, the continuation of the claim against Dr. Partridge was unreasonable and without foundation. The defendant shall be awarded his costs and attorney's fees expended from June 16, 2004 through December 21, 2006 as follows:

Attorneys Fee.....$87,971.35
Costs..... 8,255.51

Defendant's counsel is requested to prepare the appropriate order incorporating this opinion and the court's prior opinion of August 2, 2006, and order of September 15, 2006, granting defendant's Motion for Summary Judgment and granting judgment against plaintiff for defendant's attorney's fees in the amount of $87,971.35 and costs in the amount of $8,255.51.

Very truly yours,

/s/
Timothy S. Fisher
Judge

APPENDIX D

CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS, VIRGINIA

Law No. 31259-EHtTF

[September 15, 2006]

PAUL J. MEYERS, M.D., Plaintiff,	)
v.	)
JOHN R. PARTRIDGE, M.D., Defendant.	)

ORDER

This cause came to be heard on the 10th day of July, 2006, upon motion of defendant John R. Partridge, M.D. for Summary Judgment, previously filed.

Prior to commencing argument on the Motion for Summary Judgement, the plaintiff moved for leave to file a "Amended First Motion for Judgment" which was denied as the matter was set for trial on August 1st, less than three (3) weeks from the date of the hearing on July 10, 2006.

The defendant then moved for a continuance based on the unavailability of a material witness for the August 1st trial date which the court granted.

Following the granting of the Motion for Continuance to the defendant, plaintiff renewed its motion for leave to file its First Amended Motion for Judgment which was granted. The court deferred decision on the Motion for Summary Judgment pending filing of said pleading.

After a hearing, *ore tenus*, with consideration of all matters raised and argued at said hearing to include the application of a prior decision of this court, *Meyers v. Mary Immaculate Hospital*, Case No. C101-31395-H-02 of December 1, 2003, incorporating a Letter Opinion dated September 5, 2003, (cert. denied Virginia Supreme Court) as judicially admitted during said hearing; and a review of all pleadings filed herein to include pleadings and memorandum and briefs of counsel filed prior to said hearing and subsequently, prior to preparation of the Letter Opinion dated August 2, 2006, which is incorporated herein as if fully restated; the Motion for Summary Judgment filed by defendant against plaintiff is granted.

This matter is not dismissed and the execution of judgment granted by the Motion for Summary Judgment be and hereby is suspended pending the petition for attorney's fees to be filed by defendant based on their previous petition pursuant to 42 U.S.C. 11113.

Defendant is ordered to file his petition for attorney's fees within ~~twenty~~-one fourteen (~~21~~ 14) days

from today and the plaintiff shall have fourteen (14) days from receipt of defendant's petition for attorney's fees to file such response as he may be advised.

Following the expiration of the time period herein or the receipt of a response from the plaintiff, the defendant will set the matter with the court for a hearing on the petition for attorney's fees. The objections and exceptions of the plaintiff to the court's granting of the Motion for Summary Judgment be and hereby are noted herein as contained in all briefs and memoranda submitted prior to the hearing on July 10, 2006 and all matters raised in argument at the hearing on July 10 to include and incorporating herein the plaintiff's proposed order of August 29, 2006 noting objections and exceptions therein. The signatures of counsel for both parties be and are hereby waived pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia as all counsel are present in court on September 15, 2006 at 2:00 p.m. at the time of the entry of this order and have made their objections for the record.

/s/
Timothy S. Fisher
Judge

APPENDIX E

Seventh Judicial Circuit
COMMONWEALTH OF VIRGINIA

TIMOTHY S. FISHER
JUDGE

2501 HUNTINGTON AVENUE
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August 2, 2006

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Norfolk, VA 23514

Re: Paul J. Meyers, M.D. v. John R. Partridge, M.D.
Law No. CL01-31259 EHtTF

Counsel:

This cause came on to be heard on July 10, 2006, on defendant's Motion for Summary Judgment.

Prior to commencing argument on the Motion for Summary Judgment the plaintiff moved for leave to file a "Amended First Motion for Judgment" which had been filed with the court several days previously.

The court initially denied the plaintiff's motion to file its First Amended Motion for Judgment as the trial date was August 1st, less than three weeks from the date the plaintiff was seeking to file its First Amended Motion for Judgment.

The defendant then moved for a continuance based on the unavailability of a material witness for the August 1st trial date.

The court reluctantly granted the defendant's motion to continue and at that time returned to plaintiff's motion for leave to file the First Amended Motion for Judgment which had just been denied since the trial date, based on the defendant's motion for continuance being granted, was now going to be moved.

The plaintiff renewed its motion for leave to file it's "First Amended Motion for Judgment" which was granted by the court.

The plaintiff agreed that the First Amended Motion for Judgment being filed did not alter any matter relative to defendant's Motion for Summary Judgment set for argument on July 10, 2006 and both parties agreed to proceed on the defendant's Motion for Summary Judgment as the plaintiff agreed, with the court, "the Amended Motion for Judgment doesn't really change anything." The response from plaintiff's counsel was, "No, not really, your honor. It's a legal question before the court." (Tr. P.33. 7/10/06) A brief recitation of the facts of this case is all that is necessary for resolution of this question and is as follows:

The plaintiff, Paul J. Meyers, M.D., is an obstetrician-gynecologist formerly employed by Riverside Regional Medical Center (Riverside) from the period June 1991 to March 1, 2000 in Newport News, Virginia.

Defendant, John R. Partridge, M.D., is an obstetrician-gynecologist in the City of Richmond, Virginia who is authored two reports reviewing patient medical records of the plaintiff which plaintiff alleged are defamatory. The is no allegation by either side that Dr. Meyers and Dr. Partridge, had any prior personal or professional contact before the circumstances which led to this situation; nor is there any allegation that up to this date they have actually met or spoken with each other.

Paraphrasing footnote 1. of the plaintiff's brief opposing defendant's Motion for Summary Judgment:

On March 1, 2000, the plaintiff's clinical privileges at Riverside were suspended. On March 30, 2000, Mary Immaculate Hospital (MIH) where the plaintiff also had privileges, became aware of the suspension of the privileges by Riverside and met with the plaintiff concerning that suspension.

On April 17, 2000 Mary Immaculate Hospital (MIH) suspended plaintiff's clinical privileges based upon the suspension imposed upon the plaintiff by Riverside.

Both Riverside and Mary Immaculate subsequently conducted "fair hearings" in the process of professional review of the actions against the plaintiff.

On July 11, 2000 Riverside gave MIH copies of the medical records of 31 patients Meyers had treated at Riverside... "MIH retained Partridge to review these medical records..." There is no allegation that Dr. Partridge had any involvement in this matter regarding Dr. Meyers other than authoring the reports reviewing Meyers' medical records which he was "retained" to review by Mary Immaculate Hospital as part of the professional review process.

From this rather succinct statement of the facts, six different law suits were files in this

1. Paul J. Meyers, M.D. v. Bon Secours-Virginia Health Source trading as Mary Immaculate Hospital and Cynthia Farrand and Hawes Campbell, III, M.D., defendants; and

2. Paul J. Meyers, M.D. v. Allen B. Nichols, M.D. and Dennis A. Holbrook; and,

3. Paul J. Meyers, M.D. v. John R. Partridge, M.D. and Bon Secours of Hampton Roads; and,

4. Paul J. Meyers, M.D. v. John R. Partridge, M.D. and J. Allen Adelman; and,

5. Paul J. Meyers, M.D. v. Riverside Hospital trading as Riverside Regional Medical Center and Urology of Virginia, P.C. and Eric Koffer, M.D. and,

6. the instant case

The resolutions of this motion rests on application to and interpretation of provisions of the Healthcare Quality Improvement Act (HCQIA), 42 U.S.C. section 11111 to the facts and circumstances of this case.

That section of the act essentially provides a limitation of damages, i.e. immunity, to categories of individuals or entities under two provisions of that section.

42 U.S.C. section 11111(a) provides "immunity" in a "professional review action" to the following:

(A) The professional review body

(B) Any person acting as a member or staff to the body

(C) Any person under a contract or other formal agreement with the body, and

(D) Any person who participates with or assists the body with respect to the action,

This will be referred to as (a)(1) immunity.

Subsection (a)(2) provides for "protection for those providing information to professional review bodies." and states as follows:

"Not withstanding any other provision of law, no person (whether as a witness or otherwise) providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable for damages under any law of the United States or of any state (or political subdivision thereof) unless such information is false and the person providing it knew that such information was false." **This will be referred to as (a)(2) immunity.**

The plaintiff and defendant have distilled the question to be answered in the Motion for Summary Judgment as to whether the defendant Dr. Partridge is entitled to (a)(1) immunity or (a)(2) immunity, either or both. (TR. p. 73, 7/10/06) Whether based upon application of legal principle or a belated acceptance of reality, the plaintiff agrees the actions of Mary Immaculate Hospital (MIH) in the facts and circumstances of this case, have been determined to have met "all the standards specified in section 412

(a)(42 U.S.C. section 11112(a) so as to provide Mary Immaculate Hospital with immunity as determined by this judge's immediate predecessor, the Honorable Edward L. Hubbard, in the matter of Paul J. Meyers, M.D. v. Mary Immaculate Hospital, Inc., et al and Paul J. Meyers, M.D. v. Allen B. Nichols, M.D. and Dennis A. Holbrook, Law No. 31395-EH. (TR. p. 57, 7/10/06) Said order having been entered by the Circuit Court for the City of Newport News on the 1st day of December, 2003 with the plaintiff's petition for appeal to the Supreme Court of Virginia being denied by order of the Supreme Court dated June 16, 2004. (TR. p. 76, 7/10/06)

Since the plaintiff in Footnote 1 of its "Brief in Opposition To Defendant's Motion for Summary Judgment" also alleges and concedes and agrees that the defendant in this case Dr. Partridge was "retained" by Mary Immaculate Hospital to review the medical records which Riverside had used in their suspension of the plaintiff and since Mary Immaculate Hospital had based their suspension of the plaintiff upon Riverside's action; the only question remaining is whether Dr. Partridge qualifies for immunity under section 42 U.S.C. section 11111(a)(1) or subsection (a)(2) of the Act; the plaintiff having conceded the Act applies in this case and that the plaintiff failed to rebut the presumption contained in the Act that the actions of Mary Immaculate Hospital were a professional review action presumed to have meet all of the standards contained in 42 U.S.C. section 11112(a) of the Act. (TR p. 73, 7/10/06)

As Judge Hubbard correctly noted in his letter opinion of September 5, 2003, incorporated in the

judgment order of December 1, 2003 aforementioned, the presumption is not rebutted and summary judgment is appropriate when, "a reasonable jury could not concluded that the plaintiff has shown by a preponderance of the evidence that (the hospital) was motivated to take its action by something other than the reasonable belief that suspending him would improve health care at the hospital." *Weiters v. Roper Hospital, et als*, 58 Fed. Appx. 40; 203 U.S. App. Lexis 3620 (2003) (4th Cir. 2003).

Once the presumption has not been rebutted and the professional review action meets the standards of the act, then the immunities contained under section 42 U.S.C. section 11111(a)(1) and section (a)(2) of the same section come into play.

The question presented by this Motion for Summary Judgment is whether the defendant Dr. Partridge is entitled to immunity under section (a)(1) or (a)(2) of the section either or both. (TR. p. 73, 7/10/06)

Frankly, based on the facts and circumstances of this case, the court does not consider this to be a close question.

Although there does not appear to be a Virginia decision directly on point there are several other state courts which have addressed this issue in surprisingly similar situations.

In 2001 in the Supreme Court of New York, for Richmond County, in the matter of *Sithian v. Staten Island University Hospital, et al,* the court considered

the matter which arose out of a peer review of Dr. Sithian. A review of that opinion would show the Director of Surgery at Staten Island University Hospital "sought an independent outside review of Dr. Sithian's surgical cases due to a high instance of morbidity and mortality..." After a review of that report Dr. Sithian was suspended from "performing complex vascular surgery procedures...".

> Following SIUH's suspension of privileges, Dr. Chang was retained to conduct a peer review of Dr. Sithian's cases. Dr. Chang, who is a vascular surgeon, was employed by the Albany Medical Center Hospital.

The opinion further states there was a three day hearing before a committee of the medical staff of SIUH which was requested to rule by Dr. Sithian "without the report of Dr. Chang."

"Six days later, the hospital received Dr. Chang's review on July 8, 1996. After a review of the records and reports of SIUH, Dr. Chang concluded that Dr. Sithian had failed to provide surgical treatment commensurate with accepted medical and surgical standards and that he should not be permitted to perform index (complex) vascular procedures."

"On April 25, 1997, while the matter was still under consideration by the Board of Trustees, Dr. Sithian commenced a law suit against Dr. Spence. A separate action against Dr. Chang and the Medical Executive Committee was thereafter commenced for, inter alia, libel, slander and economic interference." The initial trial judge in the case, who unfortunately

subsequently died during the proceedings, rules as follows on January 19, 2000;

> That all defendants established their rights to immunity from the plaintiff's suit as a matter of law. The retaliatory lawsuits of this nature are precisely what the HCQIA and the State immunity statutes were intended to discourage in order to encourage frank, open and meaningful medical peer review to monitor the quality of care rendered to patients.

In ruling on a later motion for attorney's fees under the Act, the court concluded, "in order to have commenced his action against Dr. Chang, the plaintiff should have had proof of actual malice–to do otherwise was to bring a frivolous lawsuit."

The court concluded in awarding Dr. Chang's his attorney's fees as follows:

> Dr. Chang agreed to participate in the peer review to assist the quality of care in his field. He had no contact with Dr. Sithian, and was independent from the hospital. Dr. Chang was not a member of the SIUH Board and practices in the Albany area. *Sithian v. Staten Island University Hospital, et al,* 189 Misc. 2d 410, 734 N.Y.S.2d 812, 2001 N.Y. Misc. LEXIS 380.

Although the aforementioned factual outline in that case was surprisingly similar to the present facts and circumstances, the following case decided in 2005 in Ohio is eerily similar to the present case.

In the Court of Appeals of Ohio for the Eighth Appellate District in Cuyahoga County in the matter of *Michael M. Fox, M.D. v. Parma Community General Hospital, et al,* 160 Ohio App. 3d 409; 2005 Ohio 1665; 827 N.E.2d 787 (2005) the court reviewed the following facts.

The plaintiff in that case was a specialist in colon and rectal surgery. The defendant, Parma Community General Hospital had extended him courtesy staff privileges and had reappointed him for two year periods when in 1999 they gave him "active staff privileges for general colon and rectal surgery."

Doctor Fox apparently also had privileges at Southwest General Hospital which began in 1993.

His privileges at Southwest were suspended in February 2000.

> In July 2000, plaintiff requested privileges to perform colostomies and polypectomies at PCGH. In ruling upon this request, the PCGH learned that plaintiff's privileges had been suspended at Southwest. The Surgical Services Quality Support Committee, a subcommittee of PCGH's Department of Surgery, subsequently reviewed all of plaintiff's cases from 1999 forward, or approximately 160 inpatient cases and approximately 310 outpatient cases....
>
> Using various regulatory standards to evaluate plaintiff's cases during the relevant time period, PCGH compiled a list of nine cases for outside review. The Medical Staff Executive Committee

> selected Christopher R. Mantyh, M.D., an assistant professor of surgery at Duke University Medical Center, to conduct the review.

After a review of the report, "PCGH suspended plaintiff following this meeting."

> The reviewer, Dr. Mantyh, did not testify but his report was submitted into evidence. Dr. Mantyh was critical of plaintiff's treatment of the nine patients at issue, including his surgical techniques and presurgical preparation.

Plaintiff filed suit against PCGH but apparently did not sue Dr. Mantyh in the subject case which rendered the opinion. In the part of the opinion which extensively analysed the application of the Health Care Quality Immunity Act to those particular facts and circumstances, the court said the following in subsection C.

> **Application of HCQIA requirements to this matter**
>
> In this matter, plaintiff insists that the presumption of immunity was defeated because critical material facts were falsified in each of the nine cases which were the focus of the peer review. While he does not know whether PCGH supplied Dr. Mantyh with false information or whether Dr. Mantyh unilaterally invented and falsified information for his report, he insists that such falsification occurred and that this defeats immunity in this matter. He also

ascribes sinister motives to hospital personnel and complains that the review was continued despite preliminary determination that no quality of care issues were identified in a preliminary report.

As an initial matter, we note that any purported bad faith or malice on the part of the defendants is immaterial. (Citations omitted) It is undisputed that plaintiff's status at the hospital was evaluated only after PCGH learned of the suspension at Southwest. Further, the preliminary report clearly expressed concern about the number of readmissions, and returns to surgery, as well as appropriateness of surgical procedures. Moreover, the record irrefutably establishes that an outside reviewer was selected to avoid the appearance of impropriety, and cases were chosen for outside review based upon clearly defined criteria, including postsurgical complication. Absolutely no evidence of any fraud or falsification was presented. Rather, the record clearly portrays what is most fairly described as genuine differences in opinion regarding the preoperative status of some of the patients, their surgical or medical problems, the best techniques for dealing with such problems, and their conditions following surgery. Indeed, the essence of the record is best described in Dr. Pritchard's averment, 'What surgery was required is a judgment call on the part of the surgeon.' Looking to the totality of the circumstances, the professional review action

was 'undertaken in the reasonable belief that quality health care was being furthered.'

It would appear the practice of obtaining an independent review of questionable medical practices or procedures is certainly a proper practice and appears to be the "standard of care" in these procedures and without doubt should continue to be encouraged.

Section (a)(1) "immunity" provides a limitation on damages in professional review actions for the "professional review body" and "any persons acting as a member or staff to that body." The prior multiple litigations spawned by this set of facts and circumstances have resulted in decisions sustaining that immunity to the hospitals in question, the members of the Medical Executive Committees or other committees meeting and reviewing these actions and the doctors who were on those panels.

We now consider the suit against the doctor who was hired by Mary Immaculate Hospital to conduct an independent review of the cases used by Riverside Hospital to suspend Dr. Meyers as Mary Immaculate was conducting an independent review of the actions taken against Dr. Meyers by Riverside to determine whether their actions were appropriate.

Dr. Partridge was "retained" by Mary Immaculate Hospital to review those records. He is clearly a person "under a contract or other formal agreement with the Body; and he is without doubt "a person who participate(d) with or assist(ed) the body with respect to the action." If there is any person who should be

extended immunity under this act, it would be a professional hired to conduct an independent review who had no contact with either the body conducting the review or the doctor in question or any of the patients. To not extend such immunity to facilitate independent review would mean no physician would participate in such a manner and the "quality of healthcare" would not be "furthered".

In this case, Dr. Partridge is a physician practicing in Richmond, some seventy (70) miles away from the Newport News area who was hired to conduct an independent review of this action and to not extend immunity to an independent professional "retained" by the body to participate in or assist in the peer review action would be to mean that there would be no "independent review" of any of these actions across the country and clearly such "independent review" would also benefit the healthcare professional who is the subject of the peer review action.

The plaintiff makes much of the (a)(2) "protection for those providing information to professional review bodies" arguing that Dr. Partridge only "provided information" and therefore, he cannot have immunity because of the bare allegations in this case that the information provided by Dr. Partridge was "false" and known by him to be false. Whether section (a)(2) would apply to the defendant Dr. Partridge in this case or not, is moot as the court has determined that Dr. Partridge in his status as a "retained" independent expert hired to review medical records by the "body" has immunity under (a)(1) of 42 U.S.C. section 11111.

Having said that, the court would suggest the parties' attention to two cases reviewed during consideration of this decision which are suggestive of the type of individual or entity that would receive immunity under section (a)(2), "for those providing information to a professional review bodies." That section describes that type of entity receiving that immunity as (whether as a witness or otherwise) and in *Imperial v. Surburban Hospital Association, et al,* 37 F.3d 1026 (4th Cir. 1994) the peer review action in that case started against the plaintiff by a "original memorandum of his department head, Dr. John S. Saia, the former Chairman of Medicine at Surburban Hospital, which initiated the proceedings with a recommendation against reappointment." The process began with the memorandum from Dr. Saia and, "in addition to Dr. Saia's review the questions about Imperial's competence were reviewed separately by the Medical Staff Credential's Committee and a Medical Staff Executive Committee." The court concluded:

> The record in this case establishes that the inquiry into Imperial's performance was focused on quality healthcare concerns, and we have found no evidence that Dr. Saia, or any other person, 'participating' in the review of Imperial, did not have the 'reasonable belief' that what he was doing was addressing the quality of the health care at the hospital. Accordingly, summary judgment was appropriate on the immunity question.

Although the court used the word "participating" it is clear in that case that Dr. Saia's letter actually initiated the peer review process and such a person

would be "a witness or otherwise" providing information.

The Supreme Court of Nebraska in 1996, in reviewing the decision of *Shilling v. Moore, 249 Neb. 704, 545 N.W. 2d 442 (1996)* reviewed the fact situation where the plaintiff, a licensed psychiatrist was being reviewed by a Credentials Committee in her reapplication for medical staff privileges. The Credentials Committee requested that the defendant, who was the chairperson of the Department of Psychiatry at the Emmanuel Medical Center, make an assessment of her as to the quality and standard of her practice. He did prepare a report which indicated some concerns about the plaintiff's practice and treatment regarding a particular patient and the plaintiff alleged that as a result of an entry in a patient's medical chart, the plaintiff and defendant spoke via telephone. The plaintiff alleged that during that telephone conversation, Dr. Moore "told her that she had no patient care problems but would be placed on concurrent case review because Moore did not like her attitude."

The court stated that "on appeal, Shilling contends that Moore's assessment report to the Credentials Committee was false and that he knew it was false." The court concluded in its opinion, "whether a material issue of fact is raised by the above alleged discrepancy is immaterial to our review. In order to overcome HCQIA's rebuttal of presumption of immunity, Shilling must show, by a preponderance of the evidence that Moore's assessment report was false and that he knew it was false." In this particular instance, Dr. Moore was essentially Dr. Shilling's supervisor on

the staff and had been asked to "make an assessment of Shilling as to the quality and standard of her practice. Dr. Moore was not "retained" by the body to conduct an independent review of medical records. The court did conclude finally that "HCQIA (Citation omitted) affords greater protection in defamation actions to persons and medical peer reviewers than does state law. A federal statute pre-empts State law which is less restrictive than federal law." *Shilling, id.*

There can be no participant in this action more deserving of the immunity provided by the Health Care Quality Immunity Act than Dr. John R. Partridge, M.D. who was a total stranger to this process and was retained by the professional review body to conduct an independent review of medical records utilized by Riverside Hospital in the initial suspension of Dr. Meyers in the attempt by Mary Immaculate Hospital to obtain all of the information and perform a fair and adequate review of their decision to suspend Dr. Meyers to improve the quality of healthcare.

He is therefore entitled to the immunity contained under 42 U.S.C. section 11111(a)(1) under either or both being under a "contract or formal agreement" with the body and being one who "participated or assisted the body" as there is simply no other characterization of his function in this process.

There is no reason to reach the plaintiff's issue of whether or not the information provided by Dr. Partridge was false and that he knew it to be false and the court can provide no better summary of that than the conclusion made by the Honorable Edward L.

Hubbard in his prior decision referenced herein as follows:

> Plaintiff also has not produced evidence which proves by a preponderance of the evidence that any professional experts relied upon by defendants, were not competent as medical professionals or acted with any intent which may have resulted in an opinion adverse to the interest of plaintiff. Plaintiff's major complaint is that defendants' relied on opinions which his evidence clearly shows were wrong. The dark reality of this is that the professionals involved in the peer review process received all the evidence as presented and selected what they believed to be creditable, salient, relevant, material evidence and based their conclusions thereon. *Meyers v. Mary Immaculate Hospital*, Case No. CL01-31395-H-02, Judgment order entered December 1, 2003, incorporating Letter Opinion dated September 5, 2003.

Accordingly, the defendant's Motion for Summary Judgment is granted and this matter is continued for consideration of the defendant's request for attorney's fees and costs as provided pursuant to 42 U.S.C. 11113.

The court would ask counsel for the defendant to prepare the order granting the Motion for Summary Judgment incorporating this opinion therein and providing the defendant twenty-one (21) days from the entry of the order to submit his petition for attorney's fees including the basis and grounds for such claim pursuant to 42 U.S.C. 11113 serving such motion upon

the plaintiff and plaintiff shall have twenty-one (21) days from receipt of defendant's petition for attorney's fees to file any opposition thereto should it be so advised, and upon receipt of the petition and motion and any opposition thereto or the expiration of the above time periods, the parties shall set the matter for a hearing with the court relative to the petition for attorney's fees pursuant to 42 U.S.C. 1113.

Very truly yours,

/s/
Timothy S. Fisher
Judge

APPENDIX F

CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS, VIRGINIA

At Law No. CL01-31259H-02

[Filed February 15, 2002]

PAUL J. MEYERS, M.D.,
Plaintiff,

v.

JOHN R. PARTRIDGE, M.D.,
Defendant.

ORDER

This cause came on the 4th day of December, 2001 pursuant to the defendant's Demurrer and Amended Demurrer, and was argued by counsel.

The court having duly and maturely considered the Demurrer and Amended Demurrer, the Motion for Judgment, the Briefs filed by plaintiff and defendant, and the arguments of counsel, it is accordingly,

ADJUDGED and ORDERED that the Demurrer and Amended Demurrer, and each of the five grounds specifically alleged therein, are OVERRULED for the

reasons more fully set forth in the Court's letter dated February 5, 2002, which letter is incorporated by this reference as if set forth verbatim, and it is further ORDERED that the defendant shall file responsive pleadings to plaintiff's Motion for Judgment within twenty-one (21) days of the date of the entry of this Order, to which action of the Court, the defendant, John R. Partridge. M.D., objects and excepts on the grounds set forth in his Demurrer, Amended Demurrer, his Brief filed in support of said Demurrers and his arguments before this Court.

ENTER: February 15, 2002

/s/
The Honorable Edward L. Hubbard

I ask for this.

/s/ p.q.
Christopher Colt North

Seen and objected to:

/s/ p.d.
John Franklin, III

APPENDIX G

Seventh Judicial Circuit
COMMONWEALTH OF VIRGINIA

EDWARD L. HUBBARD
JUDGE

2500 WASHINGTON AVENUE
CIRCUIT COURTROOM TWO
NEWPORT NEWS, VIRGINIA 23607
(757) 926-8828
FAX (757) 926-7572

February 5, 2007

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751-A Thimble Shoals Boulevard
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John Franklin, III, Esquire
Taylor & Walker, P.C.
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555 Main Street
Norfolk, VA 23514

Re: Paul J. Meyers, MD v. John R. Partridge, MD
Law No. 31259-EH

Dear Gentlemen:

This matter came before the court on a Demurrer filed by the Defendant, John R. Partridge, M.D., and was argued by counsel for Plaintiff and Defendant. The court has reviewed the Motion For Judgment, the Demurrer, the Amended Demurrer and the briefs filed by Plaintiff and Defendant. To overstate the obvious, the court notes that the Demurrer admits the truth of all properly pleaded material facts in the Motion For Judgment, yet alleges that the Motion For Judgment examined in that posture is legally insufficient in that it fails to state a cause of action. All reasonable factual inferences fairly and justly drawn from the admitted material fact are to be considered by the court.

Defendant's first ground for demurrer is that the Defendant is immune from civil liability, alleged in the Motion For Judgment, pursuant to section 8.01-581.19, Code of Virginia, 1950, as amended; however, the court finds that the function and position of the Defendant as alleged in the Motion For Judgment would make the application of this section inapposite under the circumstances. Defendant's first ground for demurrer is overruled.

Defendant's second ground for demurrer is that the Defendant is not liable in damages pursuant to the provisions of the Health Care Quality Improvement Act, 42 U.S.C.S., Sec. 11101, et seq. . The court finds that the Health Care Quality Improvement Act confers upon the Defendant a conditional or qualified immunity for his acts and the allegations contained in the Motion For Judgment, without more, sufficiently

negate said qualified immunity. Defendant's second ground for demurrer is overruled.

Defendant's third ground for demurrer is that Plaintiff fails to allege any factual or legal basis to support Plaintiff's assertion of bad faith and malicious intent. The court first notes that malicious intent and bad faith as used in the context of this defamation action are terms fairly synonymous. Plaintiff's Motion For Judgment, page 7, numbered paragraph 31, clearly states that the actions of the Defendant were accomplished with malice toward the Plaintiff. This paragraph was incorporated in all counts specifically pleaded in the remainder of the Motion For Judgment and those counts are replete with allegations of "verifiably [sic] false statements" by Defendant, statements made by Defendant with his knowledge of their falsity, and statements made by Defendant with reckless disregard for truth, all in reference to actual statements made by the Defendant in his report in question. These allegations *in toto* are sufficient to withstand the objection of Defendant's third ground for demurrer and, hence, Defendant's third ground for demurrer is overruled.

Defendant's fourth ground for demurrer is that Plaintiff's Motion For Judgment fails to state a cause of action for defamation in that it alleges solely the expression of opinion based on an independent review of medical records. The court notes that the review in question is a report filed by the Defendant at the request of Mary Immaculate Hospital reviewing the treatment by Plaintiff of some 31 patients. This report was not attached to or incorporated in the Motion For Judgment, nor has it been fled with the court as the

result of any motion craving oyer or any discovery motion. The allegations in the Motion For Judgment obviously reference certain portions of the report only and the purpose and directions of the request by Mary Immaculate Hospital are limited to the allegations in the Motion for Judgment. Under such circumstances, those things culled from the report and used by Plaintiff in the Motion For Judgment may necessarily be out of context; however, given the limited reach of the demurrer, upon the pleading, and without more, the allegations in the pleadings evince statements of fact. Defendant's fourth ground for demurrer is overruled.

Defendant's fifth ground for demurrer is found in Defendant's Amended Demurrer and alleges immunity from civil liability as a result of Section 8.01-581.16, Code of Virginia, 1950, as amended. The court finds this statute applicable to the matters alleged in the Motion For Judgment and further finds that the immunity provided Defendant therein is of a qualified nature. Allegations of malice have been properly pleaded in the Motion for Judgment. Again, given the limited reach of the demurrer, upon the pleading, and without more, the allegations in the Motion For Judgment are sufficient to overcome the objection of the demurrer and Defendant's fifth ground for demurrer is overruled.

The court requests that counsel for the Plaintiff prepare an order consistent with this opinion, circulate same for endorsement and forward same to the court for entry.

With kind personal regards, I am,

Very truly yours,

/s/
Edward L. Hubbard
Judge

APPENDIX H

TITLE 42 — THE PUBLIC HEALTH AND WELFARE
CHAPTER 117 — ENCOURAGING GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

42 U.S.C. § 11101. Findings

The Congress finds the following:

(1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.

(2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discovery of the physician's previous damaging or incompetent performance.

(3) This nationwide problem can be remedied through effective professional peer review.

(4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from

participating in effective professional peer review.

(5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

SUBCHAPTER I — PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

42 U.S.C. § 11111. Professional review

(a) In general

(1) *Limitation on damages for professional review actions*

If a professional review action (as defined in section 11151(9) of this title) of a professional review body meets all the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section —

(A) the professional review body,

(B) any person acting as a member or staff to the body,

(C) any person under a contract or other formal agreement with the body, and

(D) any person who participates with or assists the body with respect to the action,

shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action. The preceding sentence shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. and the Civil Rights Acts, 42 U.S.C. § 1981, et seq. Nothing in this paragraph shall prevent the United States or any Attorney General of a State from bringing an action, including an action under section 15c of title 15, where such an action is otherwise authorized.

(2) *Protection for those providing information to professional review bodies*

Notwithstanding any other provision of law, no person (whether as a witness or otherwise) providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under any law of the United States or of any State (or political subdivision thereof) unless such information is false and the person providing it knew that such information was false.

42 U.S.C. § 11112. Standards for professional review actions

(a) In general

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken —

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

42 U.S.C. § 11113. Payment of reasonable attorneys' fees and costs in defense of suit

In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section 11112(a) of this title and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith. For the purposes of this section, a defendant shall not be considered to have substantially prevailed when the plaintiff obtains an award for damages or permanent injunctive or declaratory relief.

42 U.S.C. § 11151. Definitions

In this chapter

(1) The term "*adversely affecting*" includes reducing, restricting, suspending, revoking, denying, or failing to renew clinical privileges or membership in a health care entity.

* * *

(9) The term "*professional review action*" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct

affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action. In this chapter, an action is not considered to be based on the competence or professional conduct of a physician if the action is primarily based on —

(A) the physician's association, or lack of association, with a professional society or association,

(B) the physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain business,

(C) the physician's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service or other basis,

(D) a physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or professional, or

(E) any other matter that does not relate to the competence or professional conduct of a physician.

* * *

(11) The term "*professional review body*" means a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity.

APPENDIX I

DEFENDANT'S SUPPLEMENTAL ANSWER TO PLAINTIFF'S INTERROGATORY NUMBER 10

Defendant, John R. Partridge, M.D., in response to Plaintiff's Interrogatory Number 10 to the Defendant, states as follows;

INTERROGATORIES

Interrogatory No. 10: State how much income you derived annually from reviewing medical records for insurance companies, plaintiffs, defendants, hospitals, or any other quality insurance organizations over the past five years.

ANSWER:

1997 - $54,494.00
1998 - $84,533.00
1999 - $94,203.00
2000 - $73,662.00
2001 - $106,280.00

APPENDIX J

CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS, VIRGINIA

At Law No. CL01-31259H-02

[Filed ____]

PAUL J. MEYERS, M.D.,
Plaintiff,

v.

JOHN R. PARTRIDGE, M.D.,
Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

* * *

II. THE MOTION FOR JUDGMENT

In support of his Motion for Summary Judgment, Dr. Partridge relies upon the following allegations pled in the Motion for Judgment:

A. Plaintiff is an obstetrician-gynecologist who was employed by Riverside from 1991 through 2000. (Mot. for J. at ¶ 1.)

B. Plaintiff also had privileges at MIH. (Mot. for J. at ¶ 3.)

C. Dr. Partridge is an obstetrician-gynecologist who conducts business in Richmond, Virginia. (Mot. for J. at ¶ 4.)

D. MIH suspended plaintiff's clinical privileges at MIH, and such suspension was approved by the Board of Trustees "until further information was available." (Mot. for J. at ¶ 8.)

E. After MIH suspended plaintiff, MIH, as a part of its professional review process, asked Dr. Partridge to review the medical records of 31 patients who plaintiff had treated at Riverside. (Mot. for J. at ¶¶ 6, 7.)

F. Dr. Partridge wrote a report for MIH on plaintiff's management of the 31 patients dated October 9, 2000. (Mot. for J. at ¶ 7.)

G. As a part of the professional review of plaintiff, Dr. Partridge's October 9, 2000 report was provided, among others, to the members of the Credentials and Medical Executive Committee at MIH, the Board of Trustees at MIH, the Chief Administrator at MIH, and the Chief Executive Officer and the Vice President of Medical Affairs of Bon Secours Hampton Roads. (Mot. for J. at ¶ 27.)

H. Plaintiff appealed the suspension of his privileges by MIH, and a fair hearing panel selected by MIH conducted a hearing on March 22, 2001. (Mot. for J. At ¶ 20.)

I. The Board of Trustees of MIH rejected the findings and recommendations of the fair hearing panel that plaintiff should be immediately reinstated. (Mot. for J. ¶¶ 21-22.)[1]

* * *

In two similar cases recently decided by the Circuit Court for the City of Newport News, the Court found that individuals participating with or assisting the professional review body were immune from damages pursuant to § 11111(a)(1). First, Judge H. Vincent Conway issued a Final Order in *Fuste v. Riverside Healthcare Association, Inc.*, Law No. 29743-VC, on May 12, 2006, granting defendants' Motion for Summary Judgment based on the immunity provided under the Act. A copy of the May 12, 2006 Final Order is attached as **Exhibit B**.

In the Final Order, the Court in *Fuste* held that the Act "provides two separate and independent forms of immunity in the medical peer review process, one

---

[1] Dr. Partridge denies the remaining allegations in Paragraph 21-22 through which plaintiff alleges that the Board of Trustees rejected the findings and recommendations of the fair hearing panel "in reliance solely on Partridge's report." The disputed portion of this allegation is not material to the issues pending as part of Dr. Partridge's summary judgment motion.

pursuant to 42 U.S.C. § 11111(a)(1) and a second, pursuant to 42 U.S.C. § 11111(a)(2)." Ex. B at 1. * * *

Second, Retired Judge John E. Clarkson, sitting by designation, issued a letter opinion in *Meyers v. Riverside Hospital, Inc.*, Law No. 31394-EH, * * * on June 12, 2006, granting defendants' Demurrer to the Plaintiff's Third Amended Motion for Judgment, with no further leave to amend and dismissing the action with prejudice. * * *

Likewise, other courts have found that an individual who participates in or assists in the peer review process has two independent opportunities to qualify for immunity under the Act. *See, e.g., Jenkins v. Methodist Hosps. of Dallas, Inc.*, 2004 WL 3393380 (N.D. Tex. 2004) (focusing on the two different immunities provided by the Act); *Singh v. Blue Cross & Blue Shield of Mass., Inc.*, 182 F. Supp. 2d 164 (D. Mass. 2001), *aff'd*, 308 F.3d 25 (1st Cir. 2002) (recognizing the dual basis for immunity under the Act for a person who assists the professional review body by providing information).

Pursuant to § 11111(a)(1), Dr. Partridge is entitled to immunity with respect to the allegations against him in the Motion for Judgment. * * *

APPENDIX K

99TH CONGRESS
2D SESSION
H.R.5110

IN THE HOUSE OF REPRESENTATIVES

JUNE 26, 1986

MR. WYDEN (for himself, MR. WAXMAN, MR. MADIGAN, and MR. TAUKE) introduced the following bill; which was referred to the Committee on Energy and Commerce

* * *

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE

This Act may be cited as the "Health Care Quality Improvement Act of 1986".

TITLE I — PROMOTION OF GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

SEC. 101. GOOD FAITH PROFESSIONAL REVIEW ACTIVITIES

(A) IN GENERAL.—If a professional review action (as defined in section 301(10)) of a professional review body meets the standards specified in section 102(a), except as provided in subsection (b)—

(1) the professional review body,

(2) any person acting as a member or staff to the body,

(3) any person under a contract or other formal agreement with the body,

(4) any person who participates with or assists the body with respect to the action, and

(5) any person who, without knowledge of the falsity of the information provided, provides information to the body with respect to the action,

shall not be subject to an action or liable under any Federal law and, subject to subsection (c), under any State law, with respect to the action.

* * *

SEC. 102. STANDARDS FOR A PROFESSIONAL REVIEW BODY.

(a) IN GENERAL.—The standards of this subsection, with respect to a professional review action, are that the action is taken—

(1) in good faith in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate due process to the physician or other licensed health care practitioner involved, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after the due process described in paragraph (3).

A professional review action is presumed to have been taken in good faith in the furtherance of quality health care unless it is shown, by clear and convincing evidence, to the contrary.

* * *

SEC. 103. PAYMENT OF REASONABLE ATTORNEYS' FEES AND COSTS IN DEFENSE OF SUIT.

In any suit brought against a defendant, to the extent that section 101 applies with respect to the

defendant and the defendant substantially prevails, the defendant shall be entitled to recover from the plaintiff reasonable attorneys' fees plus costs in defense of the suit.

APPENDIX L

CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS, VIRGINIA

Case No. 31395-EH

[Filed January 29, 2004]

PAUL J. MEYERS, M.D.,
Plaintiff,

v.

MARY IMMACULATE HOSPITAL, INC.,
d/b/a/ MARY IMMACULATE HOSPITAL, et al.,
Defendants.

BEFORE: The Honorable E. L. Hubbard Judge
DATE: May 9, 2003

* * *

Khoury v. Memorial Hospital and the *Medical Centers Hospital v. Terzis* are two Virginia cases that make it abundantly clear that this Court -- that the courts of Virginia will not substitute their judgment for that of the governing body or the medical leaders in these kinds of cases, so the Health Care Quality Improvement Act is entirely consistent with Virginia law on this issue.

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No. 07-981

FILED
FEB 26 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

PAUL J. MEYERS,

Petitioner,

v.

JOHN R. PARTRIDGE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

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STATEMENT OF CASE

I. Partridge's Involvement in the Professional Review Action[1]

Petitioner, Paul J. Meyers, M.D. ("Meyers"), is an obstetrician-gynecologist, and from 1991 to 2000, he was employed by Riverside Regional Medical Center ("Riverside") in Newport News, Virginia. (First Am. Mot. for J. at ¶ 1.) On March 1, 2000, Riverside terminated Meyers' employment contract

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[1] Pursuant to Rule 24 of the Rules of the Supreme Court of the United States, Partridge has included his own Statement of the Case because he is dissatisfied with the presentation by Meyers in his Petition for Writ of Certiorari ("Petition"). Pursuant to Rule 14, Partridge has included additional facts material to consideration of the questions presented.

and suspended all of his clinical privileges. (Mot. for J. at ¶ 12.)[2]

From 1997 to 2000, Meyers also had clinical privileges at Mary Immaculate Hospital ("MIH") in Newport News. (First Am. Mot. for J. at ¶ 3.) On March 30, 2000, Meyers attended a meeting with agents of MIH during which Meyers explained that his suspension at Riverside was related to patient complications, and Meyers described in detail the complications. (Mot. for J. at ¶ 17.) On April 17, 2000, MIH suspended Meyers' privileges at MIH. (Id. at ¶ 8(i).)

On June 14, 2000, the Medical Executive Committee of MIH voted to continue Meyers' suspension. (Id. at ¶ 8(ii).) On June 19, 2000, the Board of Trustees of MIH approved Meyers' continued suspension by the Medical Executive

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[2] On July 10, 2006, Meyers obtained leave of court to file a First Amended Motion for Judgment. In Plaintiff's Motion to Amend Pleadings, Meyers states that he deleted some of the allegations in the Motion for Judgment which "are not relevant to Meyers' claim for defamation *per se*" and that deleting those allegations "will facilitate a trial on of [sic] the issues." (Pl.'s Mot. to Amend Pleadings at 1.) In this Brief in Opposition to the Petition ("Brief in Opposition"), John R. Partridge has cited to both the original Motion for Judgment and the First Amended Motion for Judgment filed by Meyers, as both contain allegations relevant to Meyers' Petition.

Committee "until further information was available." (Id. at ¶ 8(iii).) Meyers claims that the "sole basis" upon which Meyers' clinical privileges originally were suspended was the fact that Riverside had terminated Meyers' employment contract on March 1, 2000. (Id. at ¶ 12.)

After Meyers' continued suspension was approved, MIH obtained from Riverside the files of thirty-one (31) of Meyers' patients at Riverside. (Id. at ¶¶ 7-8.) Those patient files showed, among other things, that during less than a four (4) month period from November 17, 1999 to March 1, 2000, Meyers perforated a patient's bowel during an operation on five different occasions. (Id. at ¶ 19.)

After obtaining the patient files from Riverside, MIH sent the files to Respondent, John R. Partridge, M.D. ("Partridge"), and requested on September 1, 2000 that Partridge review the files. (First Am. Mot. for J. at ¶ 6.) MIH directed Partridge to focus his review on: (a) whether there were appropriate indications from the surgical procedure performed; (b) whether patient selection for open versus laparoscopic approach was appropriate; and (c) whether the complications that occurred were expected, recognized appropriately, and managed appropriately. (Id. at ¶ 7.)

Partridge is an obstetrician-gynecologist who conducts business in Richmond, Virginia.[3] (Id. at ¶ 4.) At the time he was retained by MIH in September 2000 to review Meyers' files, Partridge did not know Meyers and did not have privileges to practice at either MIH or Riverside. (Reply Mem. in Supp. of Def.'s Mot. for Summ. J. at 2.) After completing his review of the patient files, Partridge rendered a report to MIH on October 9, 2000. (Id. at ¶ 12.) Through his report, Partridge recommended that Meyers' privileges at MIH be reinstated under certain conditions. (Br. of Appellee in Opp'n to Pet. for Appeal at 2.)

As a part of the professional review of Meyers, Partridge's October 9, 2000 report was provided, among others, to the members of the Credentials and Medical Executive Committees at MIH, the Board of Trustees at MIH, the Chief Administrator at MIH, and the Chief Executive Officer and the Vice President of Medical Affairs of Bon Secours Hampton Roads. (Id. at ¶ 32.) After receiving Partridge's report, MIH continued its professional

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[3] Meyers attached a page from Partridge's interrogatory answers to his Petition to support his allegation in the Statement of the Case that Partridge earns "significant income as an expert witness." (Pet. at 5-6.) The amount of money which Partridge has earned from serving as an expert witness is not a fact material to consideration of the questions presented in Meyers' Petition and thus should not be considered in connection with the Petition pursuant to Rule 14 of the Rules of the Supreme Court of the United States.

review process, and on March 22, 2001, the fair hearing panel selected by MIH conducted a hearing on Meyers. (Mot. for J. at ¶ 20(ii).) The fair hearing panel recommended Meyers' unconditional reinstatement, but that recommendation was rejected by the Board of Trustees of MIH, allegedly in reliance solely on Partridge's report.[4] (Id. at ¶¶ 21-22.) Neither the Medical Executive Committee nor the Board of Trustees of MIH chose to follow Partridge's recommendation, made in connection with his October 2000 report, that Meyers should be reinstated under certain conditions. (Id.)

After providing his report to MIH, Partridge received a letter from counsel for Meyers through which Meyers took issue with various aspects of Partridge's October 9, 2000 report and demanded that Partridge retract his allegedly false statements. (First Am. Mot. for J. at ¶¶ 34-39, 53, 62, 73, 90.) In the 2001 letter sent to Partridge, counsel for Meyers alleged that "MIH is determined to try and ruin this young physician [Meyers], and behaving like a typical American corporation inflicting institutional violence on an individual because it thinks it can get away with it. I doubt that it will even in the Fourth Circuit." (Mem. of Law Opposing Def.'s Demurrer, Ex. A, filed 12/3/01.) In the 2001 letter to Partridge, counsel for Meyers also stated that he was giving Partridge an opportunity to make "whatever

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[4] Meyers alleges that the Medical Executive Committee and the Board of Trustees of MIH rejected the fair hearing panel's recommendation "in reliance solely on Partridge's report." (Mot. for J. at ¶¶ 21-22.)

modifications [he] deem[ed] fit to make, if any, in light of the information" provided in the letter from counsel for Meyers. (Id.)

After Partridge refused to change his October 9, 2000 report (First Am. Mot. for J. at ¶¶ 39, 42), Meyers filed this lawsuit against Partridge on September 5, 2001 in the Circuit Court for the City of Newport News ("Circuit Court"), alleging four counts of defamation *per se* based on the report prepared by Partridge for MIH as part of the professional review activities and seeking $500,000 in compensatory damages and $500,000 in punitive damages.[5] (Mot. for J. at 17.)

On July 10, 2006, the Circuit Court granted Meyers leave of court to amend his lawsuit, and through the First Amended Motion for Judgment, Meyers alleged six (6) counts of defamation *per se* against Partridge and sought $650,000 in compensatory damages and $350,000 in punitive damages. (First Am. Mot. for J. at 14.) Through a letter opinion dated August 2, 2006, the Circuit

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[5] As part of his Statement of the Case, Meyers detailed the Demurrer filed by Partridge to the original Motion for Judgment and the outcome reached by the Circuit Court on the Demurrer in 2002. The Circuit Court's ruling on the Demurrer is not a fact material to consideration of the questions presented in Meyers' Petition and thus should not be considered in connection with Meyers' Petition pursuant to Rule 14 of the Rules of the Supreme Court of the United States.

Court granted Partridge's motion for summary judgment based upon the immunity from damages provided to Partridge pursuant to the Health Care Quality Improvement Act ("HCQIA") for his participation in the professional review action. (Pet., App. E.)

Since September 2001, Meyers has filed three lawsuits against Partridge in the Circuit Court, none of which resulted in a verdict for Meyers.[6] In addition, Partridge has responded to three unsuccessful petitions for appeal filed by Meyers to the Supreme Court of Virginia.[7] All of the claims which Meyers has asserted against Partridge relate

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[6] In addition to this lawsuit filed against Partridge on September 5, 2001, Meyers filed a second lawsuit against Partridge on February 5, 2003, which also named Bon Secours Hampton Roads as a defendant (Case No. CL0336286H-02). That second lawsuit was dismissed on August 19, 2004. On February 17, 2005, Meyers filed a third lawsuit against Partridge, which also named Bon Secours Hampton Roads as a defendant (Case No. CL0539045H-02). That third lawsuit still is pending in the Circuit Court, even though it has not been served on the defendants.

[7] In the second lawsuit filed by Meyers against Partridge, Meyers filed petitions for appeal on April 7, 2004 and October 5, 2004, both of which were refused by the Supreme Court of Virginia (Case Nos. 040826, 042227). In this case, Meyers filed a petition for appeal on April 19, 2007 which was refused by the Supreme Court of Virginia on October 26, 2007 (Case No. 070775).

to the October 9, 2000 report which Partridge prepared for MIH after MIH retained Partridge to participate in the professional review action following Meyers' suspension from MIH.

Partridge is one of several defendants against which Meyers has filed suit following his suspension from Riverside and MIH in 2000. In addition to the lawsuits filed against Partridge, Meyers also filed three other lawsuits relating to his suspensions, none of which resulted in a verdict in favor of Meyers.[8] In the case filed by Meyers against Riverside (Case No. 0232139H-02), the Circuit Court dismissed the lawsuit on demurrer, and Meyers appealed that ruling to the Supreme Court of Virginia. After the Supreme Court of Virginia refused Meyers' petition, Meyers appealed the decision to the Supreme Court of the United States. That related appeal to this Court was docketed on January 24, 2008 as No. 07-969, with the Brief in Opposition due by Riverside on February 25, 2007.

II. October 9, 2000 Report

Meyers alleges that Partridge rendered two reports to MIH, one on September 25, 2000 and one

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[8] Two of the three lawsuits were filed on October 23, 2001 against Riverside, Bon Secours, and several individuals (Case Nos. CL0131394H-02, CL0131395H-02). The last of the three lawsuits was filed on May 14, 2002 against two individuals regarding the suspension of Meyers' privileges (Case No. CL0232139H-02).

on October 9, 2000. (First Am. Mot. for J. at ¶¶ 10, 12). In his lawsuit and in his Petition, Meyers claims that Partridge "substantially changed" his September 25, 2000 report, that Partridge "deleted all the favorable statements" about Meyers' patient care in his September report from the report which Partridge provided on October 9, 2000, that Partridge materially "altered" the substance of his criticism of several cases, and that Partridge added fabricated criticisms to his October 9, 2000 report. (Id. at ¶¶ 11-13; Pet. at 6.) Partridge has disputed, and continues to dispute, Meyers' allegations regarding the report provided by Partridge. (Grounds of Defense at ¶¶ 9, 12; Answer to First Am. Mot. for J. at ¶¶ 11-13.) Nevertheless, Partridge does not address these factual misstatements in this Brief in Opposition because such misstatements by Meyers do not bear on the issues which would properly be before the Court if certiorari was granted.

In support of his motion for summary judgment, Partridge set forth a short list of undisputed facts, none of which dealt with whether his October 9, 2000 report contained allegedly false information, and Meyers did not contest any of the undisputed facts upon which Partridge relied. (Reply Mem. in Supp. of Def.'s Mot. for Summ. J. at 2, filed 7/7/06.) Through its ruling on Partridge's summary judgment motion, the Circuit Court did not make any factual findings regarding Meyers' allegation that the October 9, 2000 report by Partridge contains false information. In fact, the Circuit Court specifically provided that there was "no reason to reach the plaintiff's issue of whether or

not the information provided by Dr. Partridge was false and that he knew it to be false." (Pet., App. E at 37a.) Accordingly, even if this Court were to grant Meyers' Petition and review the Circuit Court's summary judgment ruling, the issue of whether the October 9, 2000 report allegedly contained false information would not be properly before the Court.

ARGUMENT

I. Partridge Is Entitled to Immunity under HCQIA.

A. Based on his Role in the Professional Review Action, Partridge Is Not Liable for Damages under 42 U.S.C. § 11111(a)(1).

Pursuant to 42 U.S.C. § 11111(a)(1), any person "under a contract or other formal agreement with the [professional review] body" and any person "who participates with or assists the [professional review] body with respect to the action" shall not be liable in damages with respect to the action "if a professional review action of a professional review body meets all the standards specified in section 11112(a)." Pursuant to § 11112(a), a professional review action must be taken

> (1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

The record for this case shows (and Meyers has never disputed)[9] that the professional review body at MIH met all the standards specified in §

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[9] At the July 10, 2006 hearing on Partridge's summary judgment motion, Meyers admitted that the standard under § 11112(a) had been met. Specifically, counsel for Meyers stated as follows: "so the record is clear, I'm conceding that it is – we are collaterally estopped from arguing that MIH's actions failed to meet the statutory standard set forth in 11112(a). That's all we are conceding. We're not conceding anything else." (Tr. for 7/10/06 hr'g at 76, filed 7/18/06.) In addition, counsel for Meyers stated: "The argument is being made as to the hospital has met statutory standards and they have, and I concede that as a matter of law...." (Id. at 87.)

11112(a). In the letter opinion dated August 2, 2006, the Circuit Court held:

> ....Whether based upon application of legal principle or a belated acceptance of reality, the plaintiff agrees the actions of Mary Immaculate Hospital (MIH) in the facts and circumstances of this case, have been determined to have met all the standards specified in section 412(a) (42 U.S.C. section 11112(a) so as to provide Mary Immaculate Hospital with immunity.... [T]he plaintiff [has] conceded the Act applies in this case and that the plaintiff failed to rebut the presumption contained in the Act that the actions of Mary Immaculate Hospital were a professional review action presumed to have meet [sic] all of the standards contained in 42 U.S.C. section 11112(a) of the Act.

(Pet., App. E at 25a-26a).

Likewise, Meyers has not disputed that Partridge was "retained" by MIH to review medical records as part of the professional review action. In its letter opinion dated August 2, 2006, the Circuit Court addressed this issue as follows:

> Since the plaintiff in Footnote 1 of its "Brief in Opposition to Defendant's Motion for Summary Judgment" also alleges and concedes and agrees that

> the defendant in this case Dr. Partridge was "retained" by Mary Immaculate Hospital to review the medical records which Riverside had used in their suspension of the plaintiff...the only question remaining is whether Dr. Partridge qualifies for immunity under section 42 U.S.C. section 11111(a)(1) or subsection (a)(2) of the Act....

(Id. at 26a.)[10] The Circuit Court described Partridge as a total stranger to the peer review process who was retained by MIH to conduct an independent review of medical records from Riverside. (Id. at 37a.) The Circuit Court concluded that Partridge was entitled to immunity under § 11111(a)(1)(C) or (D) or both because he was under a contract with MIH and because he participated or assisted the professional review body. (Id.) The Circuit Court properly concluded that "there is simply no other characterization of his function in this process." (Id.) In its letter opinion, the Circuit Court also stated that it did "not consider this to be a close question" and held that if "there is any person who should be extended immunity under this act, it would be a professional hired to conduct an independent review who had no contact with either the body conducting the review or the doctor in question or any of the patients." (Id. at 27a, 33a-34a.)

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[10] Plaintiff did not appeal this finding of the Circuit Court. Instead, Meyers agreed to this finding as part of summary judgment, and this finding is not in dispute on appeal.

Based upon the independent review of medical records which Partridge completed after he was retained by MIH as part of professional review activities which met the requirements of § 11112(a), Partridge is immune from suit for monetary damages by Meyers under § 11111(a)(1)(C) and (D).

B. The Circuit Court Properly Construed 42 U.S.C. § 11111(a)(1).

In his Petition, Meyers admits that § 11111(a) "obviously provides two independent bases of immunity," but Meyers argues that the "bases of immunity apply to different activities and not the same activity." (Pet. at 14.) Meyers claims that providing information to a professional review body is treated by HCQIA as a "different type of activity from participating with or assisting the body with a professional review action." (Id. at 12.) In support of his argument, Meyers cites to the statute itself. (Id. at 12, 14.)

A review of the plain language of § 11111(a) shows that HCQIA provides two different levels of immunity, but it does not support the two different levels for which Meyers argues in his Petition. Instead, the plain language of the statute outlines the following two levels of immunity: (1) Subsection (a)(1) provides immunity to the list of entities and persons in that subsection if the professional review action meets all of the requirements of § 11112(a); and (2) Subsection (a)(2) provides immunity to persons who provide information to the professional review body, even if the professional review action does not meet the standard of § 11112(a), unless the

information is false and the person providing it knew that such information was false. What is different about the two levels of immunity is that a person cannot be protected under (a)(1) unless the professional review action met the standards set forth in § 11112(a) whereas a person can be protected under (a)(2) even if the professional review action did not meet the standards set forth in § 11112(a) as long as he does not provide information which he knows to be false.

In addition, there is no support in HCQIA for Meyers' strained argument that "[u]nder the Act Congress enacted, a professional review body's immunity does not immunize a defendant who has knowingly made false statements to the body." (Pet. at 26.) To the extent that Congress had intended to exclude from § 11111(a)(1) immunity any persons who provided information which they knew to be false, Congress would have included that restriction in (a)(1), as it did in (a)(2). Instead, the only restrictions which Congress chose to put in § 11111(a)(1) for obtaining immunity are that the professional review action must meet the standards set forth in § 11112(a) and the entity or person seeking immunity must fall into one of the four categories listed in § 11111(a)(1)(A)-(D). Therefore, the Circuit Court properly construed § 11111(a)(1)

when it held that Partridge was entitled to immunity from damages under HCQIA.[11]

C. The Circuit Court's Construction of § 11111(a)(1) Does Not Lead to an Absurd Result.

In the Petition, Meyers claims that the Circuit Court's construction of § 11111(a) leads to "an absurd result" which "Congress could not possibly have intended" because he claims that the Circuit Court has constructed federal law in such a manner that HCQIA "immunizes person who knowingly make false statements to a hospital about a physician's case and management." (Pet. at 21-22.)

Contrary to Meyers' argument, the Circuit Court did not make any findings regarding a person who knowingly provides false information to a professional review body. The Circuit Court concluded that whether § 11111(a)(2) would apply to Partridge was "moot as the court has determined that Dr. Partridge in his status as a 'retained' independent expert hired to review medical records

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[11] At the hearing on Partridge's motion for summary judgment, Meyers admitted that Partridge was immune from the opinion which he gave on what should be done with Meyers. (Tr. for 7/10/06 hr'g at 69-70, filed 7/18/06.) Meyers also admitted that Partridge's recommendations are not information under § 11111(a)(2). Furthermore, Meyers admitted that Partridge did not have first hand knowledge but instead only had opinions which were set forth in the report which he submitted. (Id. at 78.)

by the 'body' has immunity under (a)(1)." (Id., App. E at 34a). In addition, the Circuit Court concluded that there was "no reason to reach the plaintiff's issue of whether or not the information provided by Dr. Partridge was false and that he knew it to be false." (Id. at 37a.) In its letter opinion, the Circuit Court outlined the question presented by Partridge's Motion for Summary Judgment as "whether the defendant Dr. Partridge is entitled to immunity under section (a)(1) or (a)(2) of the section either or both." (Id., at 26a, 27a.)

The Circuit Court's construction of § 11111(a)(1) does not lead to an absurd result. Instead, the Circuit Court applied the plain language of (a)(1) to the undisputed facts presented regarding Partridge's participation in the professional review action and concluded that Partridge was the exact type of person who is

entitled to immunity under § 11111(a)(1).[12] (Id. at 27a, 33a-34a.). The Circuit Court summarized its findings as follows:

> There can be no participant in this action more deserving of the immunity provided by the Health Care Quality Immunity [sic] Act than Dr. John R. Partridge, M.D. who was a total stranger to this process and was retained by the professional review body to conduct an independent review of medical records utilized by Riverside Hospital in the initial suspension of Dr.

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[12] Meyers' own explanation in the Petition regarding a reviewer further shows that Partridge is entitled to immunity under § 11111(a)(1). In the Petition, Meyers argues that a "reviewer who renders purely opinions is not 'providing information' and is not liable for defamation. The reviewer may or may not assist the body with its actions by rendering opinions, discussing and explaining them, making recommendations, and so on. If he does, the reviewer is immune for assisting the body if the body is immune but not if he or she assists the body with actions that do not meet the standards of 42 U.S.C. § 11112(a)." (Pet. at 15.) MIH provided Partridge with patient files and asked Partridge to review the files and provide his opinions on three specific topics. (First Am. Mot. for J. at ¶¶ 6-7.) Accordingly, Partridge is entitled to immunity under § 11111(a)(1) for reviewing the files and providing his opinions to MIH as part of a professional review action which met the requirements of § 11112(a).

> Meyers in the attempt by Mary Immaculate Hospital to obtain all of the information and perform a fair and adequate review of their decision to suspend Dr. Meyers to improve the quality of healthcare.

(Id. at 37a.) For the reasons stated by the Circuit Court above, there is nothing absurd about Partridge being protected pursuant to § 11111(a)(1) for his participation in MIH's professional review action.

Since providing his report to MIH on October 9, 2000, Partridge has defended against multiple defamation claims asserted by Meyers based upon the content of Partridge's report. While his involvement in the professional review action at MIH was brief, Partridge has spent over six (6) years in litigation with Meyers since he provided his report. Throughout the litigation, Meyers has continued to attempt to delve into factual allegations, claiming that Partridge's report contains false information. The Circuit Court correctly held that there is no reason to reach these factual issues because Partridge is entitled to immunity under HCQIA. The history of this case reinforces the reasons that HCQIA was drafted with the protections set forth in § 11111(a)(1).[13] A person who participates in a professional review action which

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[13] Without such immunity, doctors like Partridge will not be encouraged to participate in the professional review process for fear of being sued by suspended doctors like Meyers.

meets the standards of § 11112(a) is entitled to immunity under HCQIA and should not be required to defend every sentence of every report that he prepared after being retained to participate in a professional review action.[14]

Chapter 117 of Title 42 which contains HCQIA is titled "Encouraging Good Faith Professional Review Activities," and in § 11101, Congress sets forth findings relevant to the enactment of HCQIA. Through those findings, Congress indicated that the "increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems" which "can be remedied through effective professional peer review." 42 U.S.C. § 11101(1), (3). In addition, Congress acknowledged that the "threat of private money damage liability...unreasonably discourages physicians from participating in effective professional peer review," and Congress concluded that there is "an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review." Id. at § 11101(4), (5). Through HCQIA, the incentive and protection which Congress provides to doctors like Partridge who engage in a professional review action is the immunity protection set forth in § 11111(a). Through its decision, the Circuit Court

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[14] At the hearing on Partridge's motion for summary judgment, the Circuit Court stated that § 11111(a)(1) immunity "is there for a reason, so there simply won't be a lawsuit." (Tr. for 7/10/06 hr'g at 95, filed 7/18/06.)

has done nothing more than apply the protection which Congress enacted through HCQIA to Partridge based on his participation in MIH's professional review action after Meyers' privileges were suspended.

II. Partridge Is Entitled to Recover his Attorneys' Fees and Costs under HCQIA.

A. Meyers' First Impression Argument Was Not Raised in the Circuit Court.

Meyers frames the second Question Presented as whether HCQIA authorizes attorneys' fees where Meyers challenges Partridge's immunity under § 11111(a) on a case of first impression and Partridge prevails solely on immunity. (Pet. at i.) In Section II of the Reasons for Granting Petition, Meyers claims that the Circuit Court's interpretation of § 11113 is inconsistent with the Court's precedent because the Court has held that an award of attorneys' fees is not appropriate where the defendant prevails on a case of first impression requiring judicial resolution. (Id. at 26-27.)

Meyers' argument outlined in the second Question Presented and in Section II of the Reasons for Granting Petition is not an argument which Meyers raised in Plaintiff's Brief Opposing Motion for Attorney's Fees ("Plaintiff's Brief Opposing") filed with the Circuit Court. Instead, in Plaintiff's Brief Opposing, Meyers focused on rearguing the reasons that he claimed Partridge was not entitled to immunity under § 11111(a)(1) and the reasons that

Meyers' conduct of the litigation was not frivolous, unreasonable, without foundation or in bad faith. It was not until Meyers filed his Petition for Appeal to the Supreme Court of Virginia that he chose to raise his first impression argument in connection with the attorneys' fees and costs issues. Because Meyers did not raise his first impression argument in the Circuit Court, he should not be permitted to raise this issue on appeal to this Court.

Furthermore, even if Meyers had raised this issue before the Circuit Court, his argument still fails because similar immunity issues were decided by the Circuit Court in other cases before the case against Partridge was dismissed. In his Memorandum in Support of Motion for Summary Judgment, Partridge cited the following two cases which were decided by the Circuit Court on similar issues before Partridge's Motion for Summary Judgment was heard, one of which is a decision in another case filed by Meyers:

> In two similar cases recently decided by the Circuit Court for the City of Newport News, the Court found that individuals participating with or assisting the professional review body were immune from damages pursuant to § 11111(a)(1). First, Judge H. Vincent Conway issued a Final Order in Fuste v. Riverside Healthcare Association, Inc., Law No. 29743-VC, on May 12, 2006, granting defendants' Motion for Summary Judgment based

on the immunity provided under the Act....

In the Final Order, the Court in Fuste held that the Act "provides two separate and independent forms of immunity in the medical peer review process, one pursuant to 42 U.S.C. § 11111(a)(1) and a second, pursuant to 42 U.S.C. § 11111(a)(2)." Ex. B at 1. Pursuant to § 11111(a)(1), immunity applies to "any individual who participates with or assists in a medical peer review process if the standards set forth in 42 U.S.C.§ 11112(a) are met." Id. at 2. The Court held that when the requirements of § 11112 are not met, an individual "providing information to medical review bodies is still afforded immunity from damages, unless the information provided by such individual is false and the individual providing the information knew that it was false." Id. All of the claims against defendants were dismissed in Fuste based upon the two levels of immunity provided under the Act to the defendants.

Second, Retired Judge John E. Clarkson, sitting by designation, issued a letter opinion in Meyers v. Riverside Hospital, Inc., Law No. 31394-EH, another companion case to plaintiff's case against Dr. Partridge in which plaintiff sued Riverside when his privileges were suspended and his

> employment terminated (see numerous references to Riverside in the Motion for Judgment against Dr. Partridge), on June 12, 2006, granting defendants' Demurrer to the Plaintiff's Third Amended Motion for Judgment, with no further leave to amend and dismissing the action with prejudice.... In the letter opinion, the Court held that the process and standards of review of Riverside were reasonable, and therefore, those participating in or assisting with the peer review activity are immune from damages. Ex. C at 1. The Court concluded that plaintiff was not able to rebut defendants' presumption of immunity by a preponderance of the evidence. Id. at 2.

(Mem. in Supp. of Mot. for Summ. J. at 10-11.)[15] In light of the decisions cited above, Meyers' challenge

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[15] Other courts outside Virginia also have concluded that an individual who participates in or assists in the professional review process has two independent opportunities to qualify for immunity under HCQIA. See, e.g., Jenkins v. Methodist Hosps. of Dallas, Inc., No. 3:02CV1823-M, 2004 WL 3393380 (N.D. Tex. Aug. 14, 2004) (focusing on the two different immunities provided by the Act), aff'd, 478 F.3d 255 (5th Cir.), cert. denied, 128 S. Ct. 181 (2007); Singh v. Blue Cross & Blue Shield of Mass., Inc., 182 F. Supp. 2d 164 (D. Mass. 2001), aff'd, 308 F.3d 25 (1st Cir. 2002) (recognizing the dual basis for immunity

of Partridge's immunity under § 11111(a) was not a case of first impression; in fact, it was the second case in which litigation filed by Meyers was dismissed based upon HCQIA immunity.[16]

B. Partridge Has Shown the Elements Required to Recover his Attorneys' Fees and Costs.

In addition to providing immunity to participants in professional review actions, HCQIA

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under HCQIA for a person who assists the professional review body by providing information).

[16] The cases which Meyers cites in his Petition on the first impression issue hold that an award of attorneys' fees under § 11113 should be reviewed under an abuse of discretion standard. Sugarbaker v. SSM Health Care d/b/a St. Marys Health Ctr., 187 F.3d 853, 857 (8th Cir. 1999) ("We agree and hold that the abuse of discretion standard is the appropriate standard of review."); Muzquiz v. W.A. Foote Mem'l Hosp., 70 F.3d 422, 432 (6th Cir. 1995) (same). The Court held that a person can be assessed his opponent's attorneys fees if "a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 422 (1978). The Circuit Court applied this standard in determining that Partridge was entitled to his attorneys' fees and costs, and accordingly, the Circuit Court did not abuse its discretion in making the award set forth in its January 11, 2007 letter opinion.

contains a fee shifting provision designed to discourage physicians disciplined through a professional review action from bringing frivolous lawsuits. Defendants must show the following in order to recover their attorneys fees and costs under HCQIA:

> (1) Defendant is among the persons covered by § 11111(a);
> (2) The standards set forth in § 11112(a) were met;
> (3) Defendant substantially prevailed; and
> (4) Plaintiff's claims or conduct during the litigation were frivolous, unreasonable, without foundation or in bad faith.

42 U.S.C. § 11113. Partridge is entitled to recover his attorneys' fees and costs because he has met the requirements set forth in § 11113.

First, Partridge is among the persons covered by § 11111(a). For the reasons set forth above in Section IA, Partridge is entitled to immunity under § 11111(a)(1) as he was under a contract with MIH and participated or assisted the professional review body by reviewing the files of Meyers' patients and rendering a report to MIH regarding his review of such files. The Circuit Court explained the immunity for damages to which Partridge is entitled under (a)(1) as follows:

> Dr. Partridge was "retained" by Mary Immaculate Hospital to review

[the medical records of Meyers]. He is clearly a person "under a contract or formal agreement with the Body;" and he is without doubt "a person who participate[s] (d) with or assisted(ed) the body with respect to the action." If there is any person who should be extended immunity under this act, it would be a professional hired to conduct an independent review who had no contact with either the body conducting the independent review or the doctor in question or any of the patients. To not extend such immunity to facilitate the independent review would mean no physician would participate in such a manner and the "quality of healthcare" would not be "furthered".

In this case, Dr. Partridge is a physician practicing in Richmond, some seventy (70) miles away from the Newport News area who was hired to conduct an independent review of this action and to not extend immunity to an independent professional "retained" by the body to participate in or assist in the peer review action would be to mean that there would be no "independent review" of any of these actions across the country and clearly such "independent review" would also benefit the healthcare professional who is subject of the peer review action.

> ....[T]he court has determined that Dr. Partridge in his status as a "retained" independent expert hired to review medical records by the "body" has immunity under (a)(1) of 42 U.S.C. section 11111.

(Pet., App. E at 33a-34a.)

Second, the standards set forth in § 11112(a) were met. In a separate case filed by Meyers against MIH, the Circuit Court determined that MIH's professional review action met the requirements of § 11112(a), and Meyers has not contested that finding (nor could he) as part of this case against Partridge. The Circuit Court addressed the § 11112(a) issue as follows:

> Whether based upon application of legal principle or a belated acceptance of reality, the plaintiff agrees that the actions of Mary Immaculate Hospital (MIH) in the facts and the circumstances of this case, have been determined to have met "all the standards specified in section 412 (a)(42 U.S.C. section 11112(a)) so as to provide Mary Immaculate Hospital with immunity as determined by this judge's immediate predecessor, the Honorable Edward L. Hubbard, in the matter of Paul J. Meyers, M.D. v. Mary Immaculate Hospital, Inc., et al and Paul J. Meyers, M.D. v. Allen B. Nichols, M.D. and Dennis A. Holbrook,

> Law No. 31395-EH. (TR. p. 57, 7/10/06) Said order having been entered by the Circuit Court for the City of Newport News on the 1st day of December, 2003 with the plaintiff's petition for appeal to the Supreme Court of Virginia being denied by order of the Supreme Court dated June 16, 2004. (TR. p. 76, 7/10/06).

(Id. at 25a-26a.)

Third, Partridge substantially prevailed in the action filed against him by Meyers. Through an Order entered on September 15, 2006, the Circuit Court ruled as follows:

> After a hearing, *ore tenus*, with consideration of all matters raised and argued at said hearing to include the application of a prior decision of this court, Meyers v. Mary Immaculate Hospital, Case No. C101-31395-H-02 of December 1, 2003, incorporating a Letter Opinion dated September 5, 2003, (Cert. denied Virginia Supreme Court) as judicially admitted during said hearing; and a review of all pleadings filed herein to include pleadings and memorandum and briefs of counsel filed prior to said hearing and subsequently, prior to preparation of this Letter Opinion dated August 2, 2006, which is incorporated herein as if fully restated; the Motion for Summary

> Judgment filed by defendant against plaintiff is granted.

(Order entered 9/15/06 at 2.)

Fourth, the Circuit Court determined that Meyers' claims or conduct after it was determined that MIH was eligible for immunity under HCQIA were sufficient to meet the standard set forth in § 11113. Through its letter opinion dated January 11, 2007, the Circuit Court concluded as follows:

> Once Mary Immaculate Hospital established it's [sic] eligibility for immunity under the Healthcare Quality Improvement Act and plaintiff's petition was denied by the Supreme Court of Virginia; whether or not the initial filing of this suit against Dr. Partridge was justifiable, the continuation of that claim against Dr. Partridge was unreasonable and without foundation. The defendant shall be awarded his costs and attorney's fees expended from June 16, 2004 through December 21, 2006 as follows:
>
> Attorneys' Fee.....$87,971.35
> Costs.....8,255.51

(Pet., App. C at 16a.)[17] For the reasons stated by the Circuit Court, the fourth element under § 11113 also has been met.

Because he has shown the required elements under § 11113, Partridge is entitled to recover the attorneys' fees and costs awarded to him by the Circuit Court.

III. Meyers Has Failed to Set Forth Any Compelling Reasons for Granting his Petition.

Meyers' Petition should be denied because Meyers has failed to set forth any compelling reasons for granting certiorari. Pursuant to Rule 14(h) of the Rules of the Supreme Court of the United States, Meyers' Petition "shall contain . . . [a] direct and concise argument amplifying the reasons relied on for allowance of the writ." Following the above quoted sentence, Rule 14(h) cross references Rule 10 which indicates that a petition for a writ of certiorari only will be granted "for compelling reasons" and thereafter sets forth a non-exhaustive list of reasons the Court considers compelling. Rule 10(b)-(c) sets forth the following four justifications for granting a petition regarding appeals from state courts of last resort:

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[17] Partridge requested additional attorneys' fees prior to June 16, 2004 and after December 21, 2006 which the Circuit Court denied. Partridge did not appeal that denial.

(1) "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort";

(2) "a state court of last resort has decided an important federal question in a way that conflicts with the decision...of a United States court of appeals";

(3) "a state court...has decided an important federal question in a way that conflicts with relevant decisions of this Court"; and

(4) "a state court...has decided an important question of federal law that has not been, but should be, settled by this Court."

Here, Meyers has failed to suggest any conflict between the interpretation of HCQIA by the Virginia courts and any decision of another state court of last resort, federal court of appeals, or decision of this Court. Meyers also fails to cite a single published federal district court decision which conflicts with the interpretation of HCQIA reached by the Circuit Court. Furthermore, Meyers fails to cite any case from any state or federal court, published or unpublished, which interpreted HCQIA in the manner sought by Meyers through his Petition.

Although a conflict between courts is not required to grant a petition for writ of certiorari, the practical realities of this Court's capacity make

hearing a case in which there is no conflict between courts an extraordinary exception. Yee v. City of Escondido, 503 U.S. 519, 536 (1992) (indicating that the Court has the capacity "to decide only a small fraction" of the petitions it receives, that the Court must therefore "grant certiorari only in those cases that will enable [the Court] to resolve particularly important questions," and that the lack of a conflict in the lower courts weighs against granting certiorari); see also Kansas v. Marsh, 548 U.S. 163, 126 S. Ct. 2516, 2530 (2006) (Scalia, J.) (concurring) ("Our principal responsibility under current practice, however, and a primary basis for the Constitution's allowing us to be accorded jurisdiction to review state-court decisions, see Art. III, § 2, cls. 1 and 2, is to ensure the integrity ***and uniformity*** of federal law.") (footnote omitted) (emphasis added); Hubbard v. United States, 514 U.S. 695, 720 (1995) (Rehnquist, C.J.) (dissenting) ("We receive nearly 7,000 petitions for certiorari every Term...[and] [a] high degree of selectivity is thereby enjoined upon us in exercising our certiorari jurisdiction....[O]ur Rule 10 embodies the standards by which we decide to grant review...and [t]he negative implication of [Rule 10's requirement of a conflict between courts] borne out time and again in our decisions to grant and deny certiorari, is that ordinarily a court of appeals decision interpreting one of our precedents—even one deemed to be arguably inconsistent with it—will not be reviewed unless it conflicts with a decision of another court of appeals."). Because Meyers is asking the Court to step in and recast an immunity provision about which no federal or state courts disagree as to the proper interpretation, his Petition should be denied.

Because no conflict in interpretation of § 11111(a)(1) exists between the different courts, Meyers attempts to argue that his Petition should be granted because the Virginia courts decided an "important" question of federal law that should be settled by this Court. (Pet. at 29.) In support of his Petition, Meyers attempts to argue that the Circuit Court created new immunities under HCQIA which will protect unwarranted peer review which will expose the public to harm. (Id. at 29-33.) Instead of showing that the Petition addresses an important question of federal law decided by the Virginia courts, Section III of the Petition reveals the reality of Meyers' appeals: Meyers is dissatisfied with the broad immunity provided under HCQIA, and he ultimately is seeking reformation, rather than reinterpretation, of what he argues has been an unsuccessful statute. Meyers has failed to establish a heightened importance such that the Court "should...settle[]" the questions raised in the Petition. In fact, there is nothing to "settle" as the Circuit Court interpreted and applied the plain language of HCQIA, finding that Partridge was immune from damages in the lawsuit filed by Meyers based upon Partridge's participation in the professional review action.

In Part III of the Petition, Meyers argues that "[u]nwarranted peer review is far more common than generally recognized" and implies that the Circuit Court's commonsense interpretation of the plain language of HCQIA will improperly protect future unwarranted peer review. (Pet. at 30-31.) Meyers then cites several articles which discuss the proposition that peer review as a practice, even good

faith peer review, "has been ineffective at protecting patients." (Id. at 31.) Such articles are wholly unrelated to the scope of immunity granted by HCQIA and instead argue that peer review as an institution is ineffective. Even if these articles cited by Meyers are correct, the solution to this "unwarranted peer review" issue should come from the medical profession changing its procedure for policing doctor errors (which is the primary theme of several articles cited in the Petition) or Congress could "correct any deficiencies in the legislation," as acknowledged by Meyers in the Petition. (Id. at 32.)

The drafting of HCQIA's immunity provisions unquestionably involved a balancing act between protecting physicians improperly subject to disciplinary action and Congress' concern over the chilling effect of civil lawsuits on peer review; however, Congress's choice to draft broad immunity provisions plainly evidences the fact that encouraging peer review was ultimately a more

compelling concern to the drafters.[18] Even if the articles submitted by Meyers are correct and sweeping change in the medical profession and reduction of medical errors were not effectuated by passage of HCQIA, the courts still must apply the federal statute and its immunity provisions as written by Congress and leave reformation of the

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[18] The hearings before the House Subcommittee on Civil and Constitutional Rights, cited on page 30 of the Petition, indicate that "Unless peer review can be encouraged, we simply will not be able to provide . . . protection [from incompetent and unprofessional physicians]. It is for the benefit of millions of patients at risk from these physicians-and not for any doctor or group of doctors-that we seek a limited, but essential immunity." *Health Care Quality Improvement Act of 1986: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. (Oct. 8 and 9, 1986). Such "essential immunity" provided in § 11111(a)(1), although quite broad, is limited in that it only applies in circumstances where due process and fairness requirements are met by the reviewing board, and it cannot bar specified civil rights claims. As discussed in more detail in Section IA and B, notably absent from § 11111(a) is any reference regarding falsity of information.

statute to Congress.[19] Meyers may be frustrated with Congress' broad grant of immunity under HCQIA and may feel aggrieved by the professional review process, but he has failed to establish any

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[19] Although it is unclear why Meyers cites to Abraham Lincoln's June 16, 1858 speech in support of his claim that the instant question is important, in such speech Lincoln expressly recognizes the distinction between the roles of Congress and the Supreme Court of the United States, explaining that after Dred Scott was argued before the Court, but prior to the Court's decision, "Senator Trumbull, on the floor of the Senate, requests the leading advocate of the Nebraska bill to state *his opinion* whether the people of a territory can constitutionally exclude slavery from their limits; and the latter answers: 'That is a question for the Supreme Court.'" See Abraham Lincoln, Springfield, Il, June 16, 1858. Just as it is this Court's province to reach the constitutionality of a bill, it is Congress' role to rewrite statutes if they fail to achieve their goals. To the extent that Meyers is correct and HCQIA has failed to achieve its goals, then it is left to Congress to revise the statute as needed.

compelling reasons for granting his Petition.[20] His Petition must be denied because Meyers is asking the Court to step in and recast an immunity provision about which no federal or state courts disagree as to the proper interpretation.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, the Supreme Court of the United States should deny the Petition for Writ of Certiorari filed by Meyers. First, Partridge was properly awarded summary judgment based on the immunity provided to him under § 11111(a)(1) of HCQIA. Second, Partridge was properly awarded attorneys' fees and costs as permitted by § 11113 of

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[20] In Meyer v. Sunrise Hospital, 22 P.3d 1142, 117 Nev. 313 (2001), a case cited by Meyers in his Petition, the Supreme Court of Nevada found that a hospital was protected by the broad immunity provision in HCQIA. In a concurring opinion, Justice Shearing acknowledged that sometimes HCQIA can be used "not to improve the quality of medical care, but to leave a doctor who is unfairly treated without any viable remedy" but still agreed that the hospital was immune. 22 P.3d at 1153-54, 117 Nev. at 330. In this case, Meyers likewise believes he has been aggrieved by the professional review process and is frustrated with Congress' broad grant of immunity. Even if Meyers' frustrations were warranted, Meyers still has not established an "important" federal question which would permit this Court to recast or rewrite the broad grant of immunity in HCQIA for those involved in the professional review process.

HCQIA. Third, Meyers has not set forth any compelling reasons for granting his Petition for Writ of Certiorari.

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No. 07-981

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In The
Supreme Court of the United States

PAUL J. MEYERS, M.D.,
Petitioner,

v.

JOHN R. PARTRIDGE, M.D.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITIONER'S REPLY BRIEF

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I. MEYERS' FIRST IMPRESSION ARGUMENT IS PROPERLY BEFORE THIS COURT.[1]

Meyers raised the "first impression argument" before the Virginia Supreme Court, and Partridge did not object to his rasing it. Partridge merely disputed whether the question decided by the trial court in this case was one of first impression in Virginia.

> "In his Petition for Appeal, Meyers also claims that Partridge is not entitled to an award of attorneys fees because 'Partridge has prevailed on a case of first impression for this Court' (Pet. for Appeal at 31). This statement by Meyers is not supported by the record in this case. In his Memorandum in Support of Summary Judgment, Partridge cited the following two cases which were decided by the Circuit Court for the City of Newport News on similar issues before Partridge's motion for Summary

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[1] Because they are not germane to any question in the petition, Meyers had not addressed a number of incorrect, incomplete or misleading statements in Respondent's Statement of the Case. Suffice it to say that Meyers did not file three law suits against Partridge as he claims, Rep. at 7, ¶ 2, and the court did not dismiss the only other suit Meyers filed against Partridge for civil conspiracy and tortious interference with business expectancy on discovering that Partridge had changed his report at the behest of hospital administrators and lawyers. And this law suit was also not actively litigated for six years as claimed. Rep. at 19. Partridge essentially conducted no discovery himself, and expended considerable resources avoiding or obstructing Meyers' discovery. Petition for Appeal at 2.

> Judgment was heard, on of which is a decision from another case filed by Meyers" (citing to *Fuste v. Riverside Healthcare Ass'n, Inc.*, Law No. 29743-VC and *Meyers v. Riverside Hospital, Inc.*, Law No. 31394-EH).

Brief Opposing Petition for Appeal at 17-18. Partridge did not object to Meyers raising the "first impression argument" because it was before the trial court, and even if it was not, the trial court itself impliedly raised the issue.

Although Meyers did not make this argument to the trial court expressly, he raised it impliedly by arguing that no court besides the trial court in *Jenkins v. Methodist Hospital of Dallas*, No. 3:02-CV-1823-M, 2004 U.S. Dist. LEXIS 28094, at *48 (N.D. Tex. August 18, 2004) had ever held that persons who provide information to a professional review body are immunized by each of the two subsections of 42 U.S.C. § 11111(a), that no court had ever awarded attorney's fees in a case analogous to the present one, and that his interpretation of 42 U.S.C. § 1111(a) was not frivolous or unreasonable. *See* Brief Opposing Summary Judgment at 4-6; Brief Opposing Attorney's Fees at 3-4.

The trial court acknowledged that "there does not appear to be a Virginia decision directly on point", Pet. at 27a, ¶ 5, and relied on *Sugarbaker v. SSM Healthcare*, 187 F.3d 853, 857 (8th Cir. 1999) to justify its award of attorney's fees, *id.* at 11a, ¶ 4. In *Sugarbaker*, the Eighth Circuit denied attorneys fees under 42 U.S.C. § 11113, stating "at the time this suit was pending in the district court, no Eighth Circuit

precedent existed that addressed the standards for HCQIA immunity". *Sugarbaker*. 187 F.3d at 857-58. Therefore, the trial court also impliedly raised the first impression argument by its reliance on *Sugarbaker* and acknowledgment that this was a case of first impression in Virginia.

Partridge's contention that this is not a case of first impression in Virginia because the Circuit Court of Newport News decided similar questions in other cases before the court awarded attorney's fees in this case, Rep. at 22-23, is meritless. Even if these courts had decided the question of whether 42 U.S.C. § 11111(a)(1) immunizes persons who provided information to a professional review body, the holding of a trial court does not create legal precedent.

Therefore, the second question presented is properly before this Court, and a writ of certiorari should be granted on this question because the trial court decided it in a manner inconsistent with this Court's decision in *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 423-24 (1978), and the Eighth Circuit's decision in *Sugarbaker*, 187 F.3d at 857-58.

II. THE TRIAL COURT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD DECIDE.

Partridge's contention that there is nothing for this Court to "settle" because the trial court did not decide the first question presented in the Petition, Br. in Op

at 34, is meritless as are the reasons he advances for his position.[2]

Partridge moved for summary judgment, claiming he was immune because MIH was held immune for its actions, only after the defendants in *Fuste* and *Riverside* apprized Partridge of the court's decision in *Jenkins v. Methodist Hospital of Dallas*, No. 3:02-CV-1823-M, 2004 U.S. Dist. LEXIS 28094, at *48 (N.D. Tex. August 18, 2004). Brief Opposing Summary Judgment at 5.[3] The *Jerkins* court held that 42 U.S.C. § 11111(a) provides two independent grounds for immunity to persons who provide information to a professional review body, and that if the body is held immune for its actions, even persons who knowingly provide false information are immune under § 11111(a)(1)(D). *Jenkins* at *48.

Riverside relied on the holding and reasoning of *Jenkins* to move for reconsideration of the court's decision overruling its demurrer.

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[2] Partridge asserts that he "disputed, and continues to dispute" the allegations in his answer to the motion for judgment, Br. in Op. at 8-9; that even if the Court were to grant certiorari "whether the October 9, 2000 report allegedly contained false information would not be properly before the Court", *id.*; the trial court "did not make any findings regarding a person who knowingly provides false information to a professional review body", and concluded that whether § 11111(a)(2) would apply to Partridge was moot, *id.*

[3] The Virginia Supreme Court refused Meyers' petition in the MIH case on June 16, 2004.

> "The Defendants submit this *Motion for Reconsideration* because the Court failed to understand that HCQIA provides two separate and distinct opportunities for immunity to apply under the HCQIA. First, if a professional review action is reasonable, all persons who participate in or assist with the peer review activity are immune from damages. The falsity of any information does not defeat immunity..."

See Brief Opposing Summary Judgment at 4. Partridge moved for summary judgment on the same ground, and the question of whether § 11111(a)(1) as well as § 11111(a)(2) immunizes persons who provide information to a professional review body was before the court in this case. *See id.*; Pet. at 58a, ¶ 4.[4]

It is indisputable that Partridge provided information about Meyers' competence to MIH. The trial court overruled his demurrer on the ground that his report contained only opinions and no facts, Pet. at 44a, ¶ 3, and acknowledged that he was retained "in the attempt by Mary Immaculate Hospital to obtain all of the information" about Meyers' handling of the cases on which Riverside based its suspension, *id.* at 37a, ¶ 2. Meyers alleged that Partridge knowingly provided false information about him to MIH. Mot for J. and Fist Am. Mot. for J. The question before the court was whether this conduct is immunized by § 11111(a)(1) or § 11111(a)(2) or both, *id.* at 27a, ¶ 3. The trial court

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[4] Partridge attended oral arguments on Riverside's motion, and waited until the court ruled in Riverside's favor before moving for summary judgment himself.

said that it did not have to reach the question of whether Partridge had provided false information to MIH because he was immune for his conduct under § 11111(a)(1) given that MIH was immune, Pet. at 37a, ¶ 3 & 4, and whether Partridge was also immune under § 11111(a)(2) was moot for the same reason, *id.* at 34a, ¶ 2.

Thus, like the Jenkins court, the trial court in this case held that § 11111(a)(1)(D) immunizes a person who provides information to a professional review body, and reached its holding on the identical reasoning: to wit, that a person who provides information to a professional review body about the competence of a physician is *pari passu* assisting or participating with the body's actions. *Jenkins* at *48, Pet. at 34a, ¶ 2. Neither court premised or qualified its holding on the nature of the information provided.[5] Therefore, under the trial court's holding in this case, a person who knowingly provides false information to a professional review body will be immune under

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[5] Although the trial court embellished its holding by opining that no one was more deserving of HCQIA immunity than Partridge, and incorrectly described him as a "total stranger to this process", Pet. at 34a, ¶ 2, this puffery is *dictum*. Partridge saw one of Meyers' patients in consultation after Meyers' privileges were suspended, and had also acted as an expert witness for the hospital's attorney in medical malpractice cases. More generally, Partridge is a professional expert witness who ears a significant income form testifying in court. Therefore, the implication of the court's stranger argument - that Partridge had no incentive to make false statements about Meyers - is untrue.

§ 11111(a)(1)(D) if the body is held immune for its actions.[6]

This holding is not affected by Partridge denials in his answer to the motion for judgment or by the fact that Partridge did not pierce the pleadings and place the sufficiency of Meyers' evidence proving that Partridge knowingly provided false information to MIH before the court. This result is absurd even if it can be reached on a literal interpretation of § 11111(a) because no colorable argument can be made that immunizing persons who knowingly provide false information to a professional review body will encourage physicians to engage in effective peer review - the expressly stated purpose of HCQIA, *see* 42 U.S.C. § 11101(5) - as opposed to encourage abuses of peer review. It is evident that the Virginia Supreme Court has approved this interpretation, will apply it in future cases, and having denied petition for appeal in four cases of first impression involving HCQIA, it is unlikely to grant a petition to explain its reasoning. For all these reasons, this Court should decide the question presented.

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[6] The court also held that Partridge was immune under § 11111(a)(1)(C) as a person who had a contract or formal agreement with the body. Pet. at 37a, ¶ 3.

A. There are compelling reasons for this Court to decide whether 42 U.S.C. § 11111(a)(1) immunizes persons who knowingly provide false information to a professional review body about the competence of a physician.

The quality of health care and its oversight are of compelling interest to society. Immunities, like privileges, create incentives. If immunity is provided to those who abuse peer review - the process by which the quality of care is overseen - incentives will be created to use peer review not to improve the quality of health care but to further a variety of interests that do not benefit but harms the public interest.

Abuse of the peer review process does more than impose financial costs on its victims. Having one's clinical privileges suspended or revoked is not analogous to being laid off or even fired from a job. Such actions destroy professional careers that have taken years of training and experience to build, and ruin the lives of the physicians involved and their families to an extent that is difficult to overstate. Since powerful incentives to abuse the peer review process exist in the modern health care environment and it is impossible to practice medicine without having adverse outcomes, the opportunities and pretexts to abuse the peer review process are almost limitless.[7]

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[7] For example, hospitals have financial incentives to remove physicians from their medical staffs who lose money for the hospital because they treat indigent patients with no or limited insurance, especially if they provide the same state of the art, and

To suggest that Congress intended the immunity provisions of HCQIA to immunize persons who knowingly provide false information to a professional review body and struck a balance that would result in such injustices to members of the medical profession, Rep. at 35-36, defies common sense, and the legislative history of HCQIA. Physicians who deliberately make false statements about operating times and blood and change their reports to make them more disparaging of their colleagues, as Partridge did, First. Am. Mot. for J., are not protected by HCQIA. Similar conduct by the defendants in *Patrick v. Burget*, 800 F.2d 1498 (9th Cir. 1986), the case that led to the introduction of the Bill that became HCQIA, was described by the Ninth Circuit as "shabby, unprincipled and unprofessional", *Patrick v. Burget*, 800 F.2d 1498, 1507(9th Cir. 1986), and the cosponsors of the Bill acknowledged that the "bad faith peer review activities permitted by the *Patrick* case would never obtain immunity under H.R. 5540", *see* 132 Cong. Rec. H11590 (daily ed. Oct 17, 1986) (statements of Rep. Waxman). In the case Partridge cites for the opposite proposition, the standard for immunity under HCQIA applied was not the objective reasonableness standard Congress enacted, *see* 42 U.S.C. § 11112(a); *Singh v. Blue*

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often more costly, treatments to them as they offer more affluent patients. Hospitals have incentives to remove physicians who do not use the hospital's support services because better or less costly services are available elsewhere, or who compete with services the hospital also provides. Physicians in different specialties from physician under review may have incentives as well as direct competitors to take unwarranted peer review actions if the targeted physician requests fewer consultations and/or orders fewer expensive or invasive tests than they expect.

Cross / Blue Shield of Massachusetts, Inc., 308 F.3d 25, 32 (1st Cir. 2002), but a minimal relations test the court described as follows:

> Basically, as long as the hospitals provide procedural due process and state some minimal basis related to quality health care, whether legitimate or not, they are immune from liability. Unfortunately, this may leave the hospitals and review board members free to abuse the process for their own purposes without regard to quality medical care.

Meyer, 22 P.3d at 1153-54. Moreover, in recognition of the fact that "professional review actions brought for illegitimate reasons may not appear as such on their face",[8] a further subsection was added to the list of exclusions in § 11151(9) after hearings before the House Subcommittee on Civil and Constitutional Rights "to clarify that the list of exclusions [was] not exhaustive"[9] and "to avoid the inference that any matters not listed in this subsection [42 U.S.C. § 11151(9)] are necessarily ones related to competence

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[8] *See* 132 Cong. Rec. H9959 (daily ed. Oct. 14, 1986) (statements of Rep. Waxman describing Amendment No. 10).

[9] *See* 132 Cong. Rec. H11591 (daily ed. Oct. 17, 1986) ("a catch-all provision clarifying that the exceptions to considerations of competence or professional conduct set forth in [42 U.S.C. § 11151(9)] are illustrative, not exhaustive. We agree and have included language to this effect.") (Statements of Rep. Waxman).

or professional conduct".[10] The Nevada Supreme Court is, therefore, not correct that immunity under HCQIA reaches pretextual actions.[11]

Partridge is also not correct that Meyers is asking this Court to reform HCQIA and limit the scope of its immunity. Meyers is asking the Court to ensure that courts apply the immunity provisions and standards Congress enacted and not a chimera that is half statute, half judge made law.

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[10] *See* 132 Cong. Rec. H9959 (daily ed. Oct. 14, 1986) (statements of Rep. Waxman describing Amendment No. 10).

[11] Justice Shearing and the Nevada Supreme Court seems to have had doubts about the correctness of the decision in *Meyer* (in which revocation of privileges was based on one case) because just one month later, the court, in an opinion written by Justice Shearing, held that "One instance of an objective basis for discipline does not per se permit a hospital to claim immunity under § 11112(a)(1)". *See Clark v. Columbia / HCA Info. Serv. Inc.*, 25 P.3d 215, 223 (Nev. 2001).

CONCLUSION

The writ of certiorari should, respectfully, be granted.

Respectfully submitted

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